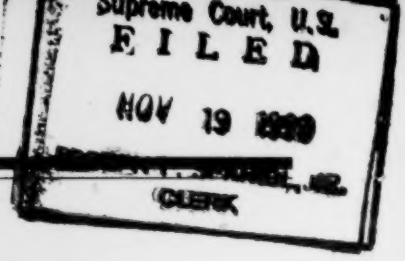
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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

POCONO GREEN, INC.,
Petitioner

vs.

BOARD OF SUPERVISORS OF KIDDER TOWNSHIP
(Carbon County), PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTION PRESENTED

Whether the Board of Supervisors of Kidder Township (Carbon County), Pennsylvania and the Supreme Court of Pennsylvania, respectively, denied preliminary approval of Petitioner's housing development based upon statements not in evidence nor part of the record, in violation of the Fourteenth Amendment to the United States Constitution.

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Shortlidge, *The "Fasano Doctrine": Land Use Decisions As Quasi-Judicial Acts*, Planning, Zoning, and Eminent Domain (Fall, 1986). 13

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BOARD OF SUPERVISORS OF KIDDER TOWNSHIP
(Carbon County), PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

The Petitioner, Pocono Green, Inc., by and through its counsel, petitions for a Writ of Certiorari to review the judgment of the Supreme Court of Pennsylvania in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania (App., *infra*, 1a - 11a) is reported at 523 Pa. 601 and 568 A.2d 612. The opinion of the Commonwealth Court of Pennsylvania (App., *infra*, 27a - 29a) is reported at 117 Pa. Commonwealth 396 and 543 A.2d 1253. The opinion of the Court of Common Pleas or Carbon County is not reported. The Report of the Supervisors of Kidder Township is not reported.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania (App., *infra*, 1a) was entered on January 16, 1990. An Application for Reargument was denied on August 22, 1990 (App., *infra*, 26a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law...

STATEMENT OF FACTS AND APPLICABLE LAW

The issue in this case is whether the state can deny a property owner the right to use his land in a manner consistent with applicable zoning regulations without affording him the safeguards of Procedural Due Process. This right is important and fundamental--too important and fundamental to be defeated by unsupported and insupportable fears of adverse impact. Yet, precisely this occurred with Petitioner's land development application to the Board of Supervisors of Kidder Township.

The Kidder Township Board of Supervisors reached an incorrect conclusion because it relied upon public opinion rather than competent evidence. Procedural Due Process provides safeguards which insure that government decisions affecting individuals are fair and accurate, not arbitrary or irrational. When government agencies stray from the structural framework of Procedural Due Process, errors are committed and rights protected by the Fourteenth Amendment are abridged.

Procedural Due Process requires that decisions regarding reasonable land use be made objectively and without hysteria. This Court has never instructed local zoning agencies to comport their actions to the Procedural Due Process requirements of the Fourteenth Amendment. The Court should issue a definitive statement that local governments must adhere to the requirements of Procedural Due Process in applying zoning ordinances to individual properties. This will safeguard against the denial of legitimate land use, based on irrational public sentiment and without regard for the rights of property owners or the larger needs of society.

I. Statement of Facts.

The Petitioner ("Pocono Green") is a real estate developer. In 1985, Pocono Green proposed a planned residential development of 465 dwellings on a tract of land partially located in Kidder Township, Carbon County, Pennsylvania. Pursuant to applicable state law and municipal ordinance, Pocono Green submitted to Kidder Township its Planned Unit Development[1] for Tentative Approval[2] of the 200 dwellings to be located in the Kidder Township portion of the tract.

Pennsylvania law provides that the municipal legislative body may assign consideration of planned developments to an independent administrative agency (generally called a "Planning Commission"). Alternatively, the municipal board may opt to review the development plans itself. Kidder Township has opted for the latter procedure. Accordingly, a public hearing on Petitioner's Planned Unit Development was held before the Board of Supervisors of Kidder Township. At the public hearing, Pocono Green presented exhibits and the sworn testimony of several witnesses, including a professional engineer. After the public hearing the Township Board of Supervisors issued a written decision, denying Tentative Approval of the Planned Unit Development.

The denial of Tentative Approval was based solely upon the Supervisors' conclusion that Pocono Green's plans for sewage

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[1] Planned developments (sometimes called "Planned Unit Developments" or "Planned Residential Developments") are a housing development model gaining increasing popularity for the construction of affordable housing. By clustering the housing units, thereby minimizing the expense of roads, sidewalks, and utilities, this type of development provides entry level housing for middle and working class families in a more aesthetically pleasant and environmentally sound manner than conventional residential development.

[2] Tentative Approval is a preliminary approval of the design scheme, critical under the Pennsylvania Municipalities Planning Code, 53 P.S. Section 1001, *et. seq.* The Tentative Approval process allows a review of the development plans for conformity to state and local land use regulations. Without Tentative Approval, the development may not proceed under Pennsylvania law. As a practical matter, also, Tentative Approval is generally necessary to secure financing for the actual construction of the Planned Unit Development. Tentative Approval was granted by the adjoining East Side Borough for the remaining 265 dwellings on December 5, 1985.

treatment were not feasible[3]. This conclusion resulted entirely from the Board's finding of fact that the stream into which Pocono Green proposed to discharge the treated wastewater processed by its sewage treatment plant (i) ran dry and (ii) emptied into a pond with no outlet. The record made before the Board contains no competent evidence to support these findings.[4]

At the public hearing, two residents of Kidder Township, who were not sworn as witnesses, asked questions of Pocono Green's engineer. While asking those questions, the residents made unsolicited comments from the floor of the public hearing, to the effect that the stream ran dry and that it emptied into a pond that had no outlet. Regardless of the truth or falsity of the unsworn statements, the Board should not have relied on them to reach its decision, because the statements were not part of the sworn testimony and were not subject to cross-examination.[5]

Nevertheless, the Board seized on these statements to

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[3]Initially, the developer has the burden to show that the sewage treatment design is feasible, 53 Pa.C.S. Section 10707(4). Feasibility, for purposes of Tentative Approval, is established by meeting the objective standards of the Ordinance and the enabling legislation, *Doran Investments v. Muhlenberg Township*, 309 A.2d 450, 10 Pa. Cmwlth. 143 (1973). The only objective standards in the Ordinance regarding sewage treatment are requirements of compliance with the Pennsylvania Department of Environmental Resources ("DER") standards and preliminary approval by DER. The *Report on Sewage and Water Facilities* prepared by Petitioner's engineer, the testimony of Petitioner's engineer, and the preliminary approval of the proposed treatment system by the Pennsylvania Department of Environmental Resources, all of which are part of the record, satisfied the objective requirements of the Ordinance and the enabling legislation. See, *Appeal of Molnar*, 441 A.2d 487, 64 Pa. Cmwlth. 515 (1982). When the developer meets these objective standards, the burden shifts to the objectors to show a lack of feasibility. See, *Bray v. Zoning Board of Adjustment*, 410 A. 2d 909, 48 Pa.Cmwlth. 523 (1980).

[4] See, Dissenting Opinion of Justice Larsen (App., infra, 9a-11a)

[5]This critical flaw is not merely an academic procedural deficiency. The Pennsylvania Supreme Court took the extraordinary step of seizing upon these same unsworn statements in supporting its decision. In its Application to the Pennsylvania Supreme Court seeking Reargument, Petitioner attached thereto the applicable United States Geological Survey map and an affidavit of a professional engineer, with accompanying photographs, showing that the stream in question flowed to an impoundment (commonly known as a "pond") created by a railroad embankment, through a concrete culvert, and then into the Lehigh River. The unsworn statements as to the stream's terminus were, in fact, false statements.

deny approval to the development. The Board stated:

> The evidence before the Board of Supervisors is sufficiently deficient in showing the feasibility of the proposed sanitary waste disposal system being a stream discharge treatment plant. A proposed system *which discharges into a stream which often runs dry and leads to a pond with no discharge point* is detrimental to the environment, the immediate residents of the area and all residents of Kidder Township in general (App., *infra*, 49a)(emphasis added).[6]

In making the finding that the stream ran dry and ran to a pond with no outlet, the Board of Supervisors confused the legislative role it normally occupies with the administrative role it exercises in reviewing land development projects. It is acceptable for a legislative body to rely upon public comment in drafting ordinances. However, when exercising its administrative functions, the Board may not rely on the kind of unproven, and ultimately false, statements that were made by the residents from the floor of the public hearing. Procedural Due Process requires the Board to limit itself to competent, sworn testimony and properly authenticated evidence. Here the Board erred fundamentally. It was swayed by the unsworn, erroneous comments of two residents, denying the Petitioner Procedural Due Process.

Pursuant to the procedural requirements of Pennsylvania law, Pocono Green sought review from the Court of Common Pleas of Carbon County, Pennsylvania. The Court of Common Pleas affirmed the Supervisors' denial of approval for the development without addressing the issue of the unsworn statements from the

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[6]The Board of Supervisors has made much of the comments of Petitioner's engineer in response to the unproven scenario painted by the objectors to the effect that the stream runs dry and ends in a pond with no outlet. These comments of the engineer in no way refute the record proof of the feasibility of the sewage treatment system. The finding of the Township and the Supreme Court of Pennsylvania that the planned sewage treatment system would be detrimental to public health, safety, and welfare necessarily depends on findings of "fact" that are unsupported by any evidence in the record.

residents.[7]

Pocono Green appealed the decision of the Court of Common Pleas to the Commonwealth Court of Pennsylvania and prevailed. The Commonwealth Court ordered that the development be granted Tentative Approval, holding that the Supervisors abused their discretion by relying on the lay testimony of the two residents. The Supreme Court of Pennsylvania agreed to review the Commonwealth Court's decision and, in a 3-to-2 decision, reversed the Commonwealth Court.

The Supreme Court of Pennsylvania relied on the finding that the sewage treatment plant would discharge into a stream that ran dry and ended in a pond with no outlet:

> *It should go without saying*, however, that when a developer has proposed a sewage treatment plant unsupported by substantial evidence demonstrating the feasibility of dumping treated sewage *into a stream that runs dry, ending in a pond with no outlet*, the public interest is at risk, the physical design of the proposal is deficient, the manner of deficiency of public service is obvious, and the relationship to the neighborhood is adverse." (App., *infra*, 9a). (Emphasis added).

The Supreme Court of Pennsylvania fell prey to the false, unsworn statements from the residents and declined to reconsider its decision (App., infra, 26a.). The Pennsylvania Supreme Court committed two fundamental errors. First, it adopted the finding that the stream ran dry and emptied into a pond with no outlet. This finding is unsupported by competent evidence on the record. Second, the Pennsylvania Supreme Court, after accepting as fact the unsworn assertions of the objectors that the stream in question runs dry and flows to a pond with no outlet, *made its own finding* that Petitioner's planned sewage treatment sys-

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[7]The Court of Common Pleas stated: "The Developer [Pocono Green] contends that the Board erroneously relied on incompetent "testimony" from two area residents who attended the meeting and questioned [Pocono Green's engineer] about the creek and pond. However, we need not reach any issue regarding the testimonial competence of the questions posed to the engineer by the residents because it is not necessary to our disposition here." (App, *infra*, 35a)

tem would create a risk to the public interest. Nothing in the record, competent or otherwise, supports this latter finding. In fact, all the evidence in the record positively contradicts these two findings.

The Pennsylvania Supreme Court also failed to address the procedural standards that must apply when the municipality exercises its administrative role. By failing to correct Kidder Township's use of legislative fact-finding standards in an administrative context, the court implicitly sanctioned such a process. Such a procedure allows municipalities virtually unlimited discretion to determine which housing projects are to be built and the power to control who gains the right to enter communities. Such a procedure violates the Due Process Clause of the Fourteenth Amendment.

II. Statement of Law.

The decision of the Pennsylvania Supreme Court allows irrational, unsubstantiated fears to guide and direct the zoning agency's review of residential development projects. Decisions based on fears rather than facts are arbitrary and unconstitutional. The judgment of the Supreme Court of Pennsylvania denies Pocono Green due process of law because the decision necessarily rests upon material not in evidence and not part of the record before that court.

The United States Supreme Court has long held that zoning ordinances are constitutional unless the provisions of the ordinance "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, and general welfare", *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). It is settled law that a municipality may not enact a zoning ordinance that is arbitrary or unrelated to the preservation of public health, safety, welfare or morals. However, the Court has left a gap in the legal process that should protect the landowner's right to use his land in conformity with the zoning ordinance. This Court has not established the procedural standards that are required to insure that a municipality's application of an otherwise constitutional zoning or land use ordinance to a particular landowner does not become arbitrary or is not motivated by purposes unrelated to legitimate governmental interests. The states and the federal courts lack guidance on the application of the requirements of Procedural Due

Process to the administrative and adjudicatory actions of zoning agencies.

In the present case, the Supreme Court of Pennsylvania failed to apply a fundamental tenet of Procedural Due Process (that the government's decision be based on competent evidence in the record) to the actions of the municipality. This case presents this Court with the opportunity to define, for the first time, the procedural requirements the Due Process Clause of the Fourteenth Amendment imposes on the application of zoning ordinances to individual landowners and properties.

A. Validity of Ordinances -- Substantive Due Process

Since *Village of Euclid v. Ambler Realty Co., supra.*, and *Nectow v. City of Cambridge*, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928) it has been clear that state regulation of land use is limited by the Due Process Clause of the Fourteenth Amendment, but that land use regulation is permitted if it is reasonably related to a legitimate governmental interest.[8] Zoning ordinances and land development regulations are presumptively valid so long so they are related to public health, safety, morals and general welfare. This application of these Substantive Due Process elements of the Due Process Clause is well integrated into the decisions of the Circuits and the state courts.

The Court's initial decisions in the area of zoning dealt with the validity of the ordinances generally. The adoption of the zoning ordinance is a quasi-legislative function. The Court analyzed the ordinances for their reasonableness and relationship to the legitimate governmental purposes of protecting public health, safety, welfare and morals. No Procedural Due Process requirements attend this legislative function, *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 36 S.Ct. 141, 60 L.Ed. 372 (1915). The right to Procedural Due Process in a legislative context would make government unworkable. It is not necessary to provide a hearing to all persons who might be affected by a general enactment of a body with the authority to legislate. The protections against improper action of the legislating body are in judicial review under the principals of Substantive Due Process and through the power to vote officials out of office.

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[8] See also, *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed. 2d 797 (1974).

The Court's decisions regarding zoning have focused on a review of the legislative function of the zoning authority.

However, a zoning ordinance that is reasonably related to a legitimate governmental interest, and therefore valid on its face, must be applied to particular properties and landowners in a manner which is not arbitrary and which is related to a legitimate governmental interest. The zoning regulation must be applied in a manner which satisfies the Procedural Due Process requirements of the Fourteenth Amendment. In the application of the ordinance to particular development plans, the role of the municipal zoning authority shifts from legislative to judicial and administrative. When the zoning authority takes on this quasi-judicial role, the legislative immunity from Procedural Due Process is removed and the concepts of Procedural Due Process must be applied to insure fair and correct application of the zoning ordinance to property owners.

B. Administrative Action -- Procedural Due Process

In the 1970s the Court articulated the application of Procedural Due Process to a variety of governmental actions affecting liberty and property interests. The Court has identified several elements of Procedural Due Process: (1) notice of the governmental action; (2) a neutral decision-maker; (3) an opportunity to present evidence; (4) an opportunity to cross-examine witnesses; (5) a decision based on the record with a statement of reasons for the decision.[9] Furthermore, the evidence upon which the decision is based must be competent and believable. Therefore, oral testimony is generally required to be given under oath, thereby impressing upon the witness his obligation to speak truthfully.[10] The Court has applied the concepts of Procedural Due

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[9] See, generally, *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed. 2d 656 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 2d 484 (1972)

[10] *Bridges v. Wixon*, 326 U.S. 135, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945) (Testimony in administrative proceedings affecting important rights must be under oath to be considered by the decision-maker). See, also *Flick v. Gately*, 328 Ill. App. 132, 65 N.E. 2d 81 (1946) (evidence in a zoning case).

Process to a variety of situations[11], but not to the application of zoning or land use ordinances to individual landowners.

Nor has the Court addressed clearly this distinction between the legislative role of the municipal zoning authority and its judicial and administrative functions. Members of the Court have expressed differing views on when the zoning agency crosses over from legislating to adjudicating, but the Court has not addressed this issue directly. In *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 96 S.Ct. 2358, 49 L.Ed. 2d 132 (1976) the Court reviewed a zoning ordinance of the City of Eastlake. The ordinance provided for all changes in zoning classification to be ratified by a referendum vote. A 55% majority of the votes cast was needed for approval. The analysis of the majority of the Court rested on the assumption that the reclassification of zoning was still within the sphere of legislative action. Therefore, no Procedural Due Process protections attached to the referendum process. In separate dissents, Justice Powell and Justices Stevens and Brennan argued that an application of the zoning ordinance to a particular property and landowner shifted the function of the zoning authority to judicial and administrative, thereby requiring Procedural Due Process safeguards to prevent an abuse of individual property rights.

However, the bulk of the zoning agency's work, including the application of the ordinance in the present case, is clearly within the adjudicatory function of the zoning authority. The Petitioner sought approval for a planned residential development, a permitted use of land under the ordinance. No zoning reclassification was sought. The Board of Supervisors' role was only to determine whether Petitioner's plans conformed to the requirements of the ordinance. This action, representative of the work assigned to the zoning authorities in applying ordinances to particular projects and properties, requires the exercise of administrative functions. Yet no standards exist to guide the states and the circuits in determining when Procedural Due Process protections apply to zoning board actions, nor what level of process is due. The result is a vacuum out of which have developed broad divi-

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11 *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972) (tenure of faculty); *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L.Ed. 2d 656 (1973) (probation revocation); *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 2d 484 (1972) (parole revocation); *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) (welfare benefits).

sions out of which have developed broad divisions among the states and circuits, uneven application of constitutionally protected rights, and uncertainty among the builders of housing that they will receive a fair and objective review of their plans by the local zoning agencies.

REASONS FOR GRANTING THE PETITION

This Court should review the decision of the Supreme Court of Pennsylvania and establish clearly the procedural standards by which zoning ordinances may be applied to individual landowners. The Court must inject order and fairness into the zoning and land development process. When municipalities assume administrative roles, they must be held to the standards of Procedural Due Process. The alternative is chaos. Ungrounded fears, shouted from the floor of zoning hearings, can effectively prevent appropriate and necessary housing construction. The Court should go on record as insisting that zoning decisions be rational, supportable, and based on fact. The Court should establish unequivocally that the long-established principals of Procedural Due Process must apply to the administration of land use and zoning regulations.

The Circuit Courts of Appeals and the states are divided as to (i) whether Procedural Due Process applies to the administration and application of zoning ordinances and (ii) if Procedural Due Process considerations do apply, what level of process is due. These constitutional rights require uniform application between jurisdictions to prevent discriminatory and exclusionary zoning practices and to provide the climate of certainty necessary to allow the investing of resources in land development and much needed affordable housing.

A. Divisions among the States and the Circuits.

The efforts by the Circuit Courts of Appeals to define whether, and to what extent, Procedural Due Process requirements must be incorporated into the administrative role of the zoning authority have resulted in widely disparate results. The Fifth Circuit has concluded that all zoning board activity is legislative and, therefore, the Due Process Clause imposes no restriction on the process utilized by the

zoning board in considering an application under a zoning ordinance, *South Gwinnett Venture v. Pruitt*, 491 F.2d 5 (5th Cir., *en banc*, 1974), *cert.* dismissed 416 U.S. 901, 94 S.Ct. 1625, 40 L.Ed. 2d 1625, *cert.* denied 419 U.S. 837, 95 S.Ct. 66, 42 L.Ed. 2d 64. In *South Gwinnett Venture*, the Fifth Circuit Court of Appeals held that the reliance of the zoning authority on evidence not in the record was not a denial of Procedural Due Process because the action was legislative and not subject to the procedural requirements of the Due Process Clause.

In sharp contrast is the Third Circuit's discussion, in *Rogin v. Bensalem Township*, 616 F.2d 680 (3rd Cir., 1980), of the distinction between the zoning authority's legislative and administrative functions and the procedural requirements that apply when the zoning board acts in its quasi-judicial role. There, the Third Circuit Court of Appeals stated:

"In contrast to legislative action is administrative action -- the scope of which *is* limited by the due process clause. An example of an administrative act would be the denial of a variance, because such an act involves not only general policy considerations but also application of that general policy to an individual landowner." 616 F.2d at 693, fn.60.

Similarly, the First and Second Circuits have found that Procedural Due Process rights do apply in administrative proceedings before the zoning board[12]. These rights include a hearing before an impartial decision-maker and the right to a decision based on facts and known standards.

However, confusion best describes the state of the law in this area. An example is *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir., 1986). There, the Eighth Circuit Court of Appeals stated that Procedural Due Process considerations were relevant, but analyzed the process by the wrong standard. After recognizing that the landowner was entitled to Procedural Due Process, the Eighth Circuit Court should have evaluated the procedural protections afforded. Instead, the Court of Appeals relied on *Euclid v. Ambler Realty*, *supra.*, and analyzed the *decision* of the zoning authority under the Substantive Due Process standard of arbitrariness and reasonableness.

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[12] *Brady v. Township of Colchester*, 863 F.2d 205 (2nd Cir., 1988), citing *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed. 2d 113 (1971); *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir., 1982), *cert.* denied, 459 U.S. 989, 103 S.Ct. 345, 74 L. Ed. 2d 385, citing *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 18 (1976).

Similar confusion and division exists among the states. The Supreme Court of Oregon was among the first of the state courts to adopt the distinction between legislative and quasi-judicial authority in *Fasano v. Board of County Commissioners*, 264 Ore. 574, 507 P.2d 23 (1973). Several other states have followed the reasoning of Fasano, but these states remain a minority.[13]

The states following *Fasano* hold that the zoning authority's legislative function is limited to enactment of the zoning ordinance and comprehensive revisions to the ordinance. Application of the zoning ordinance to a particular property is a quasi-judicial act. Application of the zoning ordinance includes approvals or denials of subdivisions, approvals of planned unit developments and other development projects, special use requests, and variance requests. With the undertaking of this quasi-judicial role, the zoning authority must conform to the requirements of Procedural Due Process. However, states adopting these protections, which are mandated by the Due Process Clause of the Fourteenth Amendment, are the minority.

The Court should establish uniform application of federally protected rights by resolving these conflicts. The Court should establish clear Procedural Due Process standards for the administrative acts of zoning agencies.

B. Application of Procedural Due Process to zoning actions is a logical and necessary safeguard to prevent exclusionary and discriminatory zoning practices.

Exclusionary zoning practices have long been recognized as an improper utilization of the state's zoning power. Exclusionary zoning is generally defined as "the complex of zoning practices which results in closing suburban housing and land markets to low- and moderate-income families."[14] Exclusionary zoning motivated by racial or economic discrimination makes the headlines. But perhaps more pervasive, and equally onerous, is discrimination against new-

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[13] See, Shortlidge, *The "Fasano Doctrine": Land Use Decisions As Quasi-Judicial Acts*, Planning, Zoning, and Eminent Domain (Fall, 1986).

[14] Davidoff and Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 Syracuse L. Rev. 511 (1971).

comers who would like to be part of a community. This type of discrimination is particularly odious in the area of housing. Housing is a fundamental human need. Discrimination against newcomers and outsiders freezes families out of communities. It allows communities to build walls and say "we were here first, no one else may enter." It attacks directly the basic rights to equal opportunity and equal access. Closing communities through exclusionary zoning practice distorts the housing market, limits the opportunity to obtain housing, and places the burden of accommodating new families squarely on those areas already urbanized and overburdened. Exclusionary zoning allows communities to shirk their responsibility to share the increasing burdens of a growing society. The inequality and unfairness injected into communities when arbitrary barriers are erected taints the dream of home ownership.

The Pennsylvania Supreme Court has been in the forefront of the development of the case law condemning exclusionary practices in zoning regulation.[15] It is ironic, therefore, that the decision of the Pennsylvania Supreme Court in the present case opens the door to discriminatory and exclusionary zoning practices. The decision of the Pennsylvania Supreme Court allows the zoning agency to deny approval to development projects without the safeguard of requiring that decisions be based on objective standards. When the zoning agency is permitted to deny land development projects without supportable reasons, there is no effective check on the exclusionary and discriminatory zoning practices that have been universally condemned.

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed. 2d 450 (1977), the Court was asked to review whether Arlington Heights' refusal to rezone a particular tract of land, to permit a low income housing project, was proper. Following on its decisions in *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed. 2d 343 (1975), and *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040 , 48 L.Ed. 2d 597 (1976), the Court in *Arlington Heights* reaffirmed the landowners' fundamental right to be free from arbitrary and irrational zoning

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[15] See, *National Land Investment Co. v. Kuhn*, 215 A.2d 597, 419 Pa. 504 (1965); *Meyers v. Board of Supervisors of Lower Makefield Township*, 394 A.2d 669, 38 Pa. Cmwlth. 578 (1978).

actions. The Court went on to declare that zoning actions motivated by racial discrimination violate this right. However, the Court was unable to conclude that the denial of Metropolitan Housing's rezoning request by the Village of Arlington Heights was racially motivated.

In essence, the Court concluded that there was insufficient evidence of discrimination. The Court recognized the evidentiary problem faced by parties alleging discrimination in the administration of a zoning ordinance:

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. . . Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. . . But such cases are rare." 429 U.S. at 266, 97 S.Ct. at ___, 50 L.Ed. 2d at 465.

Arlington Heights was brought to the Court on the theory that the denial of the rezoning violated the Equal Protection Clause. The Court did not review the actions of Arlington Heights from the perspective of Procedural Due Process. This is unfortunate because Procedural Due Process, which requires the zoning agency to disclose the reasons for its decisions, solves the evidentiary problem identified by the Court.

Requiring the zoning agency to make its determination upon known and objective standards and to state reasons for the decision, supported by facts in the record, eliminates the need to inquire into the motivations of the zoning agency. If the stated reasons are not logically consistent with the evidence, then the decision cannot stand. The subjective motivations of the zoning authority, which are virtually never apparent on the record, become irrelevant.

The Court has recognized that discrimination may be accomplished by the enactment of exclusionary zoning ordinances and by a discriminatory application of a facially neutral ordinance. What can be accomplished *de jure* by the express terms of the ordinance may also be accomplished *de facto* by the way the zoning authorities act upon the particular development application. Procedural Due Process requires that a decision of the zoning authority to be supported by facts on the record and makes the prohibition against improperly exclusive zoning practices meaningful. Absent requirements that the zoning agency (i) explain its decision, (ii) identify the

facts upon which it relies, and (iii) limit its reliance to those facts brought to it by competent evidence, the agency may hide its discriminatory and exclusionary intent behind a facade of silence or obfuscation. Without the safeguards of Procedural Due Process, parties aggrieved by the action of the zoning agency are left to attempt to prove the intent of the agency indirectly by historical and circumstantial evidence. As the holding of *Arlington Heights* makes clear, this is a difficult, if not impossible, burden. A direct requirement that the zoning agency explain itself allows the reviewing court to know whether the action of the zoning agency was motivated by legitimate or illegitimate purposes.

C. The effective administration of zoning ordinances is served by Procedural Due Process.

Procedural Due Process rights promote efficiency and accuracy in government actions, including administration of zoning ordinances. Procedural Due Process increases the likelihood that the government agency will make the correct decision.[16] This is particularly appropriate in the present case where the key finding made by the Pennsylvania Supreme Court was factually erroneous.

The Pennsylvania Supreme Court based its decision upon two findings: (i) that the stream into which Petitioner proposed its sewage treatment plant would discharge ran dry and emptied into a pond that had no outlet and (ii) that discharging treated wastewater into such a stream created a risk to public health, safety, and welfare. As is amply demonstrated by Petitioner's Exhibits and Affidavit attached to the Application for Reargument addressed to the Pennsylvania Supreme Court (App., *infra*, 12a-25a), the pond into which the stream runs does have an outlet which flows into the Lehigh River. The Pennsylvania Supreme Court's finding was based on unsworn statements of residents who were not subject to cross-examination. The assumption that discharging treated wastewater into the stream threatens the public interest is not supported by anything in the record. This assumption may have intuitive or emotional appeal, but lacks any basis in fact.

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[16] See, *Gagnon v. Scarpelli*, *supra*, where Justice Powell, writing for the majority of the Court, stated: "These [Procedural Due Process] requirements themselves serve as a substantial protection against ill-considered [government action]...", 411 U.S. at 786, 93 S.Ct. at ___, 36 L.Ed. 2d at 664.

Nevertheless, that assumption motivated both the Board of Supervisors and the Pennsylvania Supreme Court to deny Tentative Approval to Petitioner's Planned Unit Development. This is precisely why so-called "conventional wisdom", which may be quite erroneous, cannot control the application of a zoning ordinance to a particular development application. Instead, facts presented by competent evidence must drive the decision of the zoning agency. Application of the Procedural Due Process requirement that the decision be based only on competent evidence in the record would have avoided these critical factual errors.

Procedural Due Process preserves the fundamental fairness necessary to make the application of zoning ordinances constitutional.[17] Zoning and land use regulation amount to a bargain between the state and the landowner. The state seeks to infringe on the landowner's right to use his land as he wishes by the imposition of land use regulations. The landowner agrees to give up his right to use his land unfettered by zoning restrictions, in exchange for an assurance that he will be able to use his land within certain known guidelines and that he will have the right to argue for a waiver of the restriction if they cause unreasonable harm. Thus virtually all zoning ordinances contain prescribed permitted uses, uses available by special permission (known in Pennsylvania as special exceptions), and provisions for obtaining variances and development approvals.

But this bargain is only meaningful if the state is required to be fair and objective in determining whether the landowner may receive a special exception, a variance, or approval of a planned unit development. The zoning agency, in its legislative capacity, is given broad discretion in enacting ordinances. The agency's duty to explain its actions is minimal because the policy statements are broad and the direct effect on individual properties is largely theoretical and remote. But as the ordinance comes to be applied to particular properties the effect can be immediate and severe. Therefore, the agency has a greater duty to explain its decision rationally and to support the decision with facts. In this way the likelihood of a correct result is increased.

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[17] See *Developments in the Law-Zoning*, 91 Harv.L.Rev.1427 (1978).

When a zoning agency assumes an administrative role, it must also assume the burden of Procedural Due Process to provide for a fair adjudication of the individual rights affected by the governmental action. The action of the Kidder Township Board of Supervisors, in basing its decision on the unsworn comments from the audience at the public hearing, is analogous to the House of Representatives basing a decision to expel a member of Congress solely on unsworn, uncorroborated statements shouted from the gallery. Such a decision would never pass constitutional muster, and neither should the actions of the Board of Supervisors or the Pennsylvania Supreme Court in this case.

Procedural Due Process, with judicial review, serves to insure that decisions of the zoning agency will be rational, not arbitrary. The requirements that a fair hearing be held by an impartial arbiter, that competent evidence be presented, and that the arbiter state its decision in writing, supported by reasons and by facts contained in the record of evidence presented, assure that the rights of the landowner to a fair and accurate decision regarding the use of his land are preserved.

Finally, Procedural Due Process provides a more complete and understandable record upon which the courts of appeal may review the decisions of the zoning agencies. As issues of land development and environmental concern come to the fore, courts will be increasingly asked to review the decisions of local agencies. The requirements of Procedural Due Process not only increase the chances that the local agencies will make the correct decision in the first place, but will provide the reviewing courts with an understandable record upon which to make an informed analysis of the local agency's decision.

D. Effective National Housing Policy requires uniform application of Federally protected rights.

It is axiomatic to say that the federal policies protected by the Fourteenth Amendment should be applied uniformly in all fifty states. Rights guaranteed by the United State Constitution should not be contingent on state law or differing interpretations among the Circuit Courts. Presently, there is no uniform application of these constitutionally protected rights. Landowners in Oregon or, theoretically, the Third Circuit, have a mechanism to enforce their rights to Procedural Due

Process. Landowners in the Fifth Circuit do not. For this reason alone, the Court should direct the uniform application of Procedural Due Process principals to the quasi-judicial actions of zoning authorities.

But land development and housing construction particularly require certainty, clarity and objectivity in the decision-making process. Housing development necessarily demands the investment of large sums of money. Uncertainty increases risk. Increased risk means less housing is built, and the housing that is built costs more. Allowing the municipality to reject housing development projects based on fears rather than facts chills the climate for housing development, particularly planned communities such as in the present case.

Due Process provides the stability and certainty necessary to allow reasonable, appropriate, and necessary housing development. In *Boddie v. Connecticut, supra.*, Justice Harlan recognized this role of Due Process in American society:

"At its core, the right to due process reflects a fundamental value of our American Constitutional system . . . Perhaps no characteristic of an organized society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of it members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a 'legal system', social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive to achievements without the anxiety that would beset them in a disorganized society." 401 U.S. at 374, 91 S.Ct. at ___, 28 L.Ed. 2d at 117.

Planned developments require large initial investments in land acquisition, planning, and engineering costs. If the builder does not know that, upon meeting certain known requirements in the zoning ordinance, he will be able to build the proposed community, the risk will be too great to permit investment. If the municipality is allowed to reject development projects without being able to state reasons supported by evidence, then the climate for building housing is too uncertain to allow reasonable investment in housing projects affordable to middle and working class families. Procedural Due Process enforces the requirement of certainty and fairness that makes decent housing possible in the United States.

CONCLUSION

Zoning and land use regulation necessarily infringe on a fundamental property right -- the right to use one's land freely. The application of zoning ordinances to particular properties or development projects is essentially a judicial and administrative function. These functions must be undertaken only within the framework of the Procedural Due Process protections that have been fashioned to protect individuals from arbitrary and unwarranted government interference.

The Third Circuit has most clearly identified the separate legislative and administrative functions of the zoning agency. The Third Circuit has also identified that Procedural Due Process principals apply when the zoning agency acts in its administrative role.[18] The Petitioner urges the Court to adopt and develop the reasoning of the Third Circuit in *Rogin v. Bensalem Township*. The Court should identify procedural elements that must attend the application of the zoning ordinance, thereby clarifying this important area of the law for the Circuits and the states, which are presently in confusion and conflict.

Procedural Due Process promotes both fairness and accuracy. It mitigates against discrimination and exclusion. Application of Procedural Due Process principals to zoning decisions effectuates the rights the Court has identified in *Warth v. Seldin* and *Village of Arlington Heights, supra*.

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[18] *Rogin v. Bensalem Township, supra.*

The Court should grant a writ of certiorari to review and reverse the decision of the Supreme Court of Pennsylvania.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

POCONO GREEN, INC.	:
	:
v.	: NO. 3 E.D.
	: Appeal Docket 1989
	:
	:
	:
BOARD OF SUPERVISORS	:
OF KIDDER TOWNSHIP	:
(CARBON COUNTY),	:
Appellant	:

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the Order of the COMMONWEALTH COURT, be, and the same is hereby reversed, and the order of the Court of Common Pleas of Carbon County be and is hereby reinstated.

/s/ Marlene F. Lachman, Esq.
Marlene F. Lachman, Esq.
Prothonotary

Dated: January 16, 1990

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

POCONO GREEN, INC., Appellee,	: No. 3 E.D. Appeal Docket : 1989
v.	: Appeal from the Order of : the Commonwealth Court
BOARD OF SUPERVISORS OF KIDDER TOWNSHIP (CARBON COUNTY), Appellant	: dated June 29, 1988, at : Docket No. 1549 C.D. : 1987, reversing the order : of the Court of Common Pleas : of Carbon County at 85-0805, : dated June 19, 1987.
	: ___ Comwlth Ct. ___, : ___ A.2d ____ (1988) : ARGUED: October 26, 1989

OPINION OF THE COURT

MR. JUSTICE FLAHERTY FILED: January 16, 1990

On March 13, 1985, a real estate developer, Pocono Green, Inc., submitted an application for approval of a preliminary plan of a planned residential development (PRD) to the Planning Commission of Kidder Township, Carbon County. The application contains information required for a PRD by section 707 of the Pennsylvania Municipalities Planning Code, 53 P.S. Section 10707, Kidder Township's Zoning Ordinance, and the township's Subdivision and Land Development Ordinance. Among the required materials was Pocono Green's "Report on Sewage and Water Facilities," which explained that because no municipal central sewage treatment facilities were available, the Pocono Green development would have its own facility which would discharge "final treated effluent . . . to an

unnamed tributary of the Lehigh River . . . located at 41 degrees, three minutes N. latitude and 75 degrees, forty-five minutes W. longitude."

The Planning Commission then issued a report and recommendation to the Supervisors, as required by the Subdivision Ordinance, recommending that the application be given tentative approval, conditioned upon the approval of the Pennsylvania Department of Environmental Resources (D.E.R.) for sewage and water systems. On April 29, 1985 the Board of Supervisors conducted a public hearing at which Pocono Green presented its preliminary plan. At this hearing, Pocono Green's engineer testified that the sewage treatment plant was "feasible from an engineering standpoint." Additionally, as required by the Subdivision Ordinance, the developer included in its preliminary plan a letter from D.E.R. stating that Pocono Green's preliminary plans for sewage disposal were acceptable to the agency.[1]

Two local residents testified that the stream into which Pocono Green proposes to dump treated sewage sometimes runs dry and that the stream flows into a pond which does not drain except when there is a flood. Although Pocono Green's engineer was unfamiliar with the stream, he acknowledged that if the stream runs dry and does not flow from the pond,[2] there might be some

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[1] The letter of preliminary approval, dated April 1, 1985, from the Bureau of Water Quality Management, Department of Environmental Resources, stated:

This department has reviewed the preliminary plans for Pocono Green Development , located in Kidder Township and East Side Borough, Carbon County PA. The proposal submitted utilizing private water supply and distribution and for sewage collection, treatment and disposal is acceptable to the Department of Environmental Resources.

This letter constitutes concurrence by the Department of Environmental Resources, Bureau of Water Quality Management, of the preliminary proposal only, and should not be construed to represent a permit of any nature. It is still necessary that . . . planning modules, indicating approval of this proposal or a revision to the official plans of the municipalities involved, be submitted to the Department of Environmental Resources for review and approval. More detailed plans and specifications of the water supply, sewage collection and treatment will also be reviewed at a later date as part of other permit applications. Any additional Federal, State and local planning and/or permit requirements must be met.

[2] There was also testimony that the stream runs through the front yard of at least one property owner near the proposed development site.

difficulty getting a final D.E.R. approval. As he put it: "Well, you could see the problems we would have with D.E.R., getting this worked out, no doubt about it." N.T. 77a.

On June 17, 1985, the Supervisors issued their report denying Pocono Green's application based on the following findings of fact and conclusions of law.

FINDINGS OF FACT

* * *

22. Article 4 of the Kidder Township Zoning Ordinance provides there can be no habitation of any portion of the development until the residential use types are attached to a centralized water system and a centralized sewage disposal system. The Municipalities Planning Code indicates that municipalities shall determine the feasibility of proposals for the disposition of sanitary waste and storm water as being in the public interest. We find that the feasibility of the proposal for the disposition of sanitary waste has not been shown by the developer.

An issue was raised at the public hearing that the stream into which the developer proposes an effluent discharge goes dry. A second issue was raised that said stream runs to a pond from which there is no discharge of water. The testimony of developer's engineer in addressing both of these issues is inconclusive and contradictory. Statements (as found in the record) were made by residents in the area of the stream on record that it does run dry and the pond does not discharge except in flooding.

23. We find after review of all evidence presented that the developer failed to show that the proposed sewage treatment plant which will discharge into a stream which runs dry and leads into a pond that does not discharge to be feasible.[3]

* * *

CONCLUSIONS OF LAW

* * *

The evidence before the Board of Supervisors is sufficiently deficient in showing of the feasibility of the proposed sanitary waste disposal system, being a stream discharge sewage treatment plant. A proposed system which discharges into a stream which often runs dry and leads into a pond with no discharge point is detrimental to the environment, the immediate residents of the area, and all residents of Kidder Township in general.

DECISION

It is decided that the preliminary plan of Pocono Green as submitted is rejected based on the foregoing Findings of Fact and Conclusions of Law with respect to a lack of showing of feasibility of the proposed sanitary waste disposal system ....

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[3] Apparently this means that the developer's sewage treatment plan has not been demonstrated to be feasible.

On July 16, 1985 Pocono Green filed a notice of appeal in the Court of Common Pleas of Carbon County. On June 19, 1987 the court affirmed the Supervisors' decision without taking additional testimony. Pocono Green then appealed to Commonwealth Court, which reversed.

Commonwealth Court reasoned that the board had abused its discretion in determining that the developer had failed to sustain its burden of proving the feasibility of the proposed sanitary waste disposal system. The court indicated that although Pocono Green's engineer was unfamiliar with the flow of sewage into the creek and pond, the approval by D.E.R. and the testimony of a professional engineer that the proposed sewage system was "feasible from an engineering standpoint" constituted substantial evidence of the feasibility of the plan. The board filed a Petition for Allowance of Appeal, and this Court granted allocatur to address the question of whether Commonwealth Court was correct in determining that the board abused its discretion.

Pocono Green argues that the Supervisors' decision was in error in that the township's regulations on PRD applications defer to D.E.R. sewage treatment standards, and compliance with those standards, as evidenced by the D.E.R. preliminary approval, constitutes "feasibility" of a preliminary PRD plan. We disagree.

Section 10707 of the Municipalities Planning Code, 53 P.S. Section 10707, provides that an application for tentative approval of a development plan for a PRD shall be filed before the planning agency or the governing body of the municipality, and the application shall disclose:

* * * *

(v) the feasibility of proposals for water supply and the disposition of sanitary waste and storm water . . . .

53 P.S. Section 10707 (4)(v). Section 10709 further provides that the governing body or planning agency may either grant or deny tentative approval of the development plan as submitted. 53 P.S.

Section 10709 (a).

The "feasibility" of the proposed sanitary waste plan, which the local agency is authorized to decide, is determined, according to Commonwealth Court, by "substantial evidence to support a finding that the solution of a problem is likely to succeed." The burden, of course, is on the developer to prove the feasibility of his plan, and the local agency must determine feasibility by reference to the material presented by the developer.

With these principals in mind, we return to the claim that D.E.R.'s preliminary approval of the sewage treatment plan constitutes "feasibility" of the plan. Accepting Commonwealth Court's definition of "feasibility" as a showing by substantial evidence that the plan is likely to succeed, it is apparent that a preliminary agency approval is irrelevant to the plan's likelihood of success where the developer's expert indicates that he is not familiar with the stream into which the treated sewage would flow and that it will be difficult to persuade D.E.R. to issue a final approval of the sewage treatment proposal. At issue is not whether the sewage treatment plant, considered in a vacuum, is technically adequate, as is indicated by D.E.R.'s preliminary approval. Rather, of course, at issue is the feasibility of the developer's plan *as it will operate at this particular location*.

The approval of PRD applications by local agencies is not intended to be an academic exercise in creating drawing-board images to be considered in isolation from the circumstances in which they will function, but rather a determination of whether a particular drawing-board image will work as it was intended in a particular location in the real world. That is why the approval is contingent upon the feasibility of the plan, not merely upon the acquisition of a preliminary approval from D.E.R.

Further, the statute clearly places the burden of establishing this feasibility on the developer, who must submit substantial evidence that the plant will function properly where it is to be located. When the developer cannot answer questions about how the facility will operate at this location, the township may properly determine, indeed must determine, that the developer has not proved the feasibility of its plan by substantial evidence. For these reasons, the claim that D.E.R.'s preliminary approval should constitute "feasibility" under the statute is obviously without merit."[4]

Next, the developer contends that the Supervisor's reasons for denying approval are legally deficient. In particular, the developer argues that the township may not deny approval of a PRD application on grounds not contained in its ordinances. The grounds complained of are the township's findings that the proposal requires the discharge of treated sewage into a stream that runs dry leading in to a pond that does not discharge. These grounds, according to the developer, are not present in the township's land use ordinance. We understand this argument to mean that because the township has no ordinance prohibiting the discharge of sewage into streams that run dry leading to ponds with no outlet, such

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[4] Pocono Green cites our recent decision in *Coretsky v. Board of Commissioners of Butler Township*, 520 Pa. 513, 555 A.2d 72 (1989), in support of the argument that the township cannot deny approval of a PRD application on the basis of a standard not in its regulations. In *Coretsky* the township, pursuant to section 10508 of the Municipalities Planning Code, was required to specify the section of the statute or ordinance upon which its denial of approval was based:

(2) When the application is not approved... the decision shall specify the defects found in the application and describe the requirements which have not been met and shall, in each case, cite to the provisions of the statute or ordinance relied upon.

53 P.S. Section 10508 (2). The township did not specify the statutory provision upon which its denial of approval was based, and this Court held that the denial was, therefore, improper.

Coretsky has no application to the present case. In this case, the township is authorized by section 10707 of the Municipalities Planning Code to determine the feasibility of the developer's plan for sewage treatment. Such a determination, of course, must be made on the basis of information submitted by the developer. When that information does not support the feasibility of the sewage disposal plan, the township is authorized to disapprove of the application.

grounds may not be used to support a denial. Thus, according to the developer, because the township's ordinance contains no sewage requirements except that the treatment plan be approved by D.E.R., and because D.E.R. has issued a preliminary approval, the denial was in error. This argument is actually only a variation on the first argument, and also is completely meritless. The developer overlooks that the burden of presenting substantial evidence of feasibility is with him, and when he is unable to answer objections to his plan, and, in fact, indicates that he may have difficulty with the approval, the mere possibility that D.E.R. will finally approve his plan falls short of meeting that burden.[5]

Finally, the developer argues that the denial was in error because the township's findings were not supported by substantial evidence. According to the developer, it will have to meet D.E.R.'s most stringent criteria for effluent quality because the stream into which it proposes to discharge treated sewage is classified as a "high quality cold water fisher[y]." Since the township failed to make any findings as to the capabilities of the developer's proposed method of treatment, the engineering characteristics of the treatment plant, or the specific effect of the treatment plant on the stream, the developer contends that the township's determination was unsupported by substantial evidence. This argument, too, is without merit. Once again, the burden is on the developer to establish the feasibility of the sewage treatment plan, not on the township to establish its nonfeasibility. When the developer fails to meet that burden by substantial evidence, the township has no alternative but to determine that the plan is not feasible.

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[5] The developer also makes two additional related claims. First, it asserts that the Supervisors failed to provide specific objections to the plan. We disagree. The specific objections to the plan are that the developer did not meet his burden of establishing "feasibility" by presenting substantial evidence that the plan was likely to succeed.

Next, the developer claims that the requirement of D.E.R. approval is adequate in itself to protect the public interest, and therefore, that the board improperly withheld approval. Whether D.E.R.'s approval is sufficient to protect the public interest is an argument more appropriately addressed to the legislature than to this Court. The General Assembly specifically chose to empower local governing bodies to approve or disapprove the feasibility of certain components of planned residential developments, and the developer may not usurp this statutory scheme by substituting its opinion for that of the General Assembly as to how the public interest should be protected.

It is true that the township, pursuant to section 10709 of the Municipalities Planning Code, is required to set forth reasons for the denial "with particularity in what respect the development plan would or would not be in the public interest, including, but not limited to, findings of fact and conclusions on the following:

* * * *

(4) the physical design of the development plan and the manner in which said design does or does not make adequate provision for public services, . . . and further the amenities of light and air, recreation and visual enjoyment;

(5) the relationship, beneficial or adverse, of the proposed planned residential development to the neighborhood in which it is proposed to be established; . . . .

53 P.S. Section 10709 (b) (4), (5). It should go without saying, however, that when a developer has proposed a sewage treatment plan unsupported by substantial evidence demonstrating the feasibility of dumping treated sewage into a stream that runs dry, ending in a pond with no outlet, the public interest is at risk, the physical design of the proposal is deficient, the manner of the deficiency of public service is obvious, and the relationship to the neighborhood is adverse. The township was certainly not, therefore, derelict in its findings or its conclusions of law supporting the denial.

The order of Commonwealth Court is reversed. The order of the Court of Common Pleas of Carbon County is reinstated.

Mr. Justice McDermott did not participate in the consideration or decision of this case.

Mr. Justice Larsen files a dissenting opinion, which is joined by Mr. Justice Zappala.

DISSENTING OPINION

JUSTICE ROLF LARSEN FILED: January 16, 1990

I dissent. Although there is some emotional appeal to Mr. Justice Flaherty's majority opinion in this case, there is absolutely no legal basis for the Court's reversal of Commonwealth Court.

The Pennsylvania Municipalities Planning Code, Section 11005-A provides in relevant part:

> ...If the record below includes findings of fact made by the governing body, board or agency whose dicision or action is brought up for review and the court does not take additional evidence or appoint a referee to take additional evidence, the findings of the governing body, board, or agency shall not be disturbed by the court *if supported by substantial evidence....*

53 P.S. Section 11005-A. There is no evidence of record that the unnamed tributary of the Lehigh River into which appellee, Pocono Green, Inc., planned to discharge treated effluent runs dry occasionally or that it flows into the pond with no outlet. The record herein reveals that appellee, during the public hearing on its application for preliminary approval of a planned residential development, produced 1) the sworn testimony of a registered professional engineer stating that appellee's plans for a central sewage treatment and disposal were feasible, and 2) a letter from the Department of Environmental Resources (DER) giving preliminary approval to those plans. The residents who spoke at the public hearing regarding the condition of the Lehigh River tributary into which appellee proposed discharging treated effluent were not sworn in as witnesses and were not subject to cross-examination during the proceedings. Thus, it is clear that the determination of the Board of Supervisors, i.e., that the sewage treatment proposal was not feasible because the tributary ran dry at times and ended in a pond with no outlet, was not supported by substantial evidence.[1]

Additionally, a stream that flows intermittently can indeed serve as a recipient of treated waste, as can a pond with a "detention time of 14 days or more." See 25 Pa.Code Section 95.6(a) Discharges to lakes, ponds, and impoundments; *Abraham v. Commonwealth of Pennsylvania, Department of Environmental Resources,* 1980 EHB 146 (DER can require "very high degree of treatment" to sewage where receiving stream does not flow year round).

As appellee met its burden of proving that the proposed sewage treatment and disposal system was feasible, appellant, the Board of Supervisors of Kidder Township, abused its discretion in denying preliminary approval to appellee's application. The DER has

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[1] A court may take judicial notice of geographical facts; however, the extent of flow or navigability of a given watercourse must "be established by proof." See, *Brush v. Lehigh Valley Coal Co.*, 290 Pa. 322, 138 A. 860 (1927).

the expertise to determine whether or not a permit can be issued to appellee based upon the conditions existing at the site. And, indeed, a permit will not issue and the planned residential development will not be constructed if appellee's plans are in any way inadequate or constitute a threat to the environment. It is not for the Board of Supervisors or for this Court to determine, on the basis of unsworn statements of lay persons, that a particular sewage treatment and disposal system is not feasible.

Accordingly, I would affirm the decision of Commonwealth Court.

Mr. Justice Zappala joins in this dissenting opinion.

APPENDIX B

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

----------x

POCONO GREEN, INC.,	: No. 3 E.D. Appeal Docket 1989
Appellee,	:
-against-	: Appeal from the Order of the Commonwealth Court dated June 29, 1988, at Docket No. 1549 C.D. 1987, reversing the
BOARD OF SUPERVISORS OF KIDDER TOWNSHIP (CARBON COUNTY),	: order of the Court of Common Pleas of Carbon County at No. 85-0805, dated June 19, 1987
Appellant	:
	: ____Comwlth Ct.____, ____ A.2d _____(1988)
	: ARGUED: October 26, 1989
	: DECIDED: January 16, 1990

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APPLICATION FOR REARGUMENT OF APPELLEE POCONO GREEN, INC.

Application of Appellee for Reargument from Judgment of Supreme Court of Pennsylvania of January 16, 1990

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25 *Pennsylvania Code*, Chapters 91-93

APPLICATION OF APPELLEE FOR REARGUMENT

I. ORDER IN QUESTION

Pursuant to Rules 2542-2544 of the rules of this Court, Appellee Pocono Green, Inc. respectfully moves for reargument of this Court's Order filed January 16, 1990, in which the Court, by a vote of 3-2 (one Justice withdrawn and one vacancy), reversed the Order of the Commonwealth Court and reinstated the Order of the Court of Common Pleas of Carbon County in a case which will have a great impact on the cost of middle income housing throughout the Commonwealth.

II. REASONS FOR ALLOWANCE OF REARGUMENT:

A. POINTS OF LAW OVERLOOKED OR MISAPPREHENDED:

1. THE COURT OVERLOOKED OR MISAPPREHENDED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

a. The decisions by this Court's majority that (i) "the stream runs dry, ending in a pond with no outlet," (ii) "the public interest is at risk," (iii) "the physical design of the proposal is deficient," and (iv) "the relationship to the neighborhood is adverse" (Opinion, p.11) are not based upon competent and admissible evidence on the record. The first decision referenced above [(i)] was not based on competent evidence (See II.A. (1) (b), *infra*.). Decisions (ii) through (iv) above were based on absolutely no evidence. As such, those decisions are irrational, arbitrary and capricious and, therefore, a denial of Appellee's right to due process.

Approvals from political subdivisions of the States, which are required before a party's land can be improved or developed constitute "property" under the Fourteenth Amendment and are subject to due process protections. *Bello v. Walker*, 840 F. 2d 1124 (3d Cir., 1988); *Herrington v. Sonoma*

County, 834 F. 2d 1488 (9th Cir., 1987). Deprivation of property will not be allowed where there is no evidence to support it. *Thompson v. Louisville*, 362 U.S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624 (1960).

b. The Township's failure to place the objectors under oath, followed by the Township's consideration, as evidence, of their unsworn statements, not subject to cross-examination, violates Appellee's right to due process. The lack of due process is no mere academic exercise in this case. It has resulted in this Court resting its decision, in large part, upon erroneous "facts". The stream in question does not "end in a pond with no outlet." The statements of the objectors in that regard which were relied upon by the Township and this Court were false or misleading. (See Sections II.B.2 (c) and (d) and Exhibits "A" and "B" attached hereto).

c. The Pennsylvania Department of Environmental Resources ("DER") standards absolutely control all facets of design and operation of sewage treatment systems. *Council of Middletown Twp. v. Benham*, 514 Pa. 176, 523 A.2d 311 (1987). The Township expressly adopted the standards of DER as the *only* standard to be met in all matters involving sewage (See Appellee's Appendix, pp. 15, 120, 109, 110, 36, and 85), and the record shows that the sewage treatment system proposed by Appellee is feasible according to DER. (Appellee's Appendix, p. 155). The Township's denial of tentative approval based upon Appellee's purported failure to satisfy the more indefinite standard of "feasibility" referenced in Section 709(4)(v) of the Municipalities Planning Code ("MPC") is arbitrary, capricious, and irrational, and a denial of due process.

2. THIS COURT OVERLOOKED OR MISAPPREHENDED SECTION 1005-A OF THE MUNICIPALITIES PLANNING CODE, 53 P.S. 11005-A, WHEN IT FAILED TO OVERTURN THE FINDING OF THE TOWNSHIP THAT THE STREAM RUNS DRY AND ENDS IN A POND WITH NO OUTLET, IN THE ABSENCE OF SUBSTANTIAL, OR ANY, EVIDENCE.

This Court has, on numerous occasions, stated that where the Court of Common Pleas takes no additional evidence,

the appellate courts are limited to a determination of whether the board committed an abuse of discretion or error of law. *National Land and Investment Co. v. Easttown Township Board of Adjustment*, 419 Pa. 504, p. 523, 215 A.2d. 597, p. 607 (1965); *Appeal of M. A. Kravitz Co.*, 501 Pa. 200, 460 A.2d. 1075 (1983). "The court may not disturb the findings of the board if the record indicates the findings are supported by substantial evidence. 53 P.S. Section 11010." *Kravitz*, 460 A.2d. p. 1081.

There is absolutely no competent evidence of record to support the finding that the stream in question runs dry and ends in a pond with no outlet. The only mention of these alleged characteristics of the stream is unsworn testimony which was not subject to cross-examination. The Appellee never had the opportunity, obligation, or duty to refute these unsworn statements. It is a violation of the MPC, 53 P.S. 11005-A (formerly 53 P.S. 11010), for the board to base a finding upon those unsworn statements.

3. THIS COURT OVERLOOKED OR MISAPPREHENDED THE CHOICES AVAILABLE TO THE TOWNSHIP UNDER SECTION 709 OF THE MUNICIPALITIES PLANNING CODE.

The Court states that "Section 10709 [sic] further provides that the governing body or planning agency may either *grant* or *deny* tentative approval of the development plan as submitted. 53 P.S. Section 10709 (a)." (Opinion, p. 6, emphasis added) Section 709 of the MPC actually provides for a third alternative, which may be the most practical, and most just, manner of resolving the dispute between the parties in this case. That third alternative is for the Township to "grant tentative approval subject to specified conditions not included in the development plan as submitted." 53 P.S. Section 10709 (a)(2).

B. POINTS OF FACT OVERLOOKED OR MISAPPREHENDED

1. THE COURT MISAPPREHENDED DER'S PRELIMINARY APPROVAL AS BEING THE RESULT OF A TECHNICAL, ACADEMIC EXERCISE THAT DID NOT EVALUATE THE PROPOSED SEWAGE TREATMENT PLANT AS IT WILL OPERATE AT THE PARTICULAR LOCATION PROPOSED BY THE APPELLEE.

This Court misapprehended the significance of DER's preliminary approval when the court concluded that it was not substantial evidence of the feasibility of Appellee's sewage treatment plan. The court evidenced this misunderstanding when it stated:

"At issue is not whether the sewage treatment plant, considered in a vacuum, is technically adequate, as is indicated by D.E.R.'s preliminary approval." (Opinion of the Court, p.7)

The Court overlooked the fact that DER reviewed Appellee's development plans before issuing its preliminary approval. (Appellee's Appendix, p. 155) Those plans specify the number of dwellings which the treatment plant would service, the water supply and distribution system, the sewage collection and disposal system, the exact latitude and longitude of the discharge into the stream, and the quality and anticipated volume of the treated effluent. (Appellee's Appendix, p.p. 137-140)

The Court overlooked the public record showing that DER was familiar with the stream in question. Under the Clean Streams Law, DER is authorized to survey and catalog all of the waters of the Commonwealth and set water quality standards for each body of water. 35 P.S. Section 691.304. DER did that survey, prepared water quality standards for all of the waters of the Commonwealth, including the present stream, and codified that survey in the Pennsylvania Code, 25 Pa. Code Chapter 93. The classification of the subject stream is found at 25 Pa. Code Chapter 93.9, List D, p. 93-28. When DER granted preliminary approval of Appellee's plans, it did so knowing full well the stream and its characteristics.

2. THE COURT MISAPPREHENDED THE EVIDENCE OF RECORD REGARDING THE STREAM AND POND.

a. The Court misapprehended the comments of Appellee's engineer. The comment of Appellee's engineer, which the Court emphasized in upholding the Supervisors' finding of lack of feasibility, is in the *subjunctive* (Opinion, p. 3). That comment has absolutely no significance in the absence of a finding, by substantial evidence, that the stream runs dry and does not flow from the pond. At a later point in the hearing, the engineer put his prior comment in context when he stated:

"...we are not going to have a permit to build anything there unless we can demonstrate about the stream, and, *if* it is as bad as you say it is, then the requirements for treatment at that location are going to be more stringent." (Appellant's Reproduced Record, pp. 86a, 87a, emphasis added.)

b. The Court overlooked the statement of Appellee's engineer in his Report on Sewage and Water Facilities that the "[f]inal treated effluent [from the sewage treatment plant] will be discharged to an un-named tributary of the Lehigh River which flows into the river 0.8 miles downstream at a point opposite Tannery." (Appellee's Appendix, p. 140) This statement was uncontroverted by competent evidence and shows the engineer's familiarity with the stream. The stream, obviously, cannot both flow into the Lehigh River and "end in a pond with no outlet".

c. The fact that the stream does *not* end in a pond with no outlet is evidenced by the Affidavit of Christopher L. Borton, a professional engineer. The Affidavit is attached hereto, marked Exhibit "A" and incorporated herein.

d. The fact that the stream does *not* end in a pond with no outlet is further evidenced by the United States Department of the Interior Geological Survey map for the White Haven Quadrangle ("USGS map"). The USGS map shows the stream which is the focus of this case as a solid blue line from the proposed discharge point at latitude 47 degrees 03'00", longitude 75 degrees 45'00" to the pond, *and then from the pond to the Lehigh River*.

The official USGS map for the White Haven quadrangle is attached to the original of this Application for Reargument as Exhibit "B" and incorporated herein. This Court can take judicial notice of the USGS map.

3. THE COURT MISAPPREHENDED THE PERMITTING PROCESS FOR APPELLEE'S TREATMENT PLANT.

The Court misapprehended the process by which Appellee must ultimately obtain a National Pollution Discharge Elimination System ("NPDES") permit to build and operate its sewage treatment plant. DER's regulations for obtaining an NPDES permit require extensive review by DER, public notice of the permit application, and public hearings on the application. (25 Pa. Code Chapter 92) The final decisions of DER are subject to judicial review.

C. SIGNIFICANT PUBLIC POLICY CONCERNS:

This is a Planned Residential Development case which is: (a) a preferred method of development sanctioned by both case law and statute, and (b) the method under which a significant amount of middle income townhouses are built in this Commonwealth, as is this one. [1] The holding in this case will cause a significant increase in the cost of such development and throw a

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[1] Planned Unit Development (or Planned Unit Residential Development) was sanctioned by this Court in *Village 2 at New Hope, Inc.*, 429 Pa. 626, 241 A.2d 81 (1968) and that holding was carried over and codified as Article VII of the Pennsylvania Municipalities Planning Code. Later this kind of development was given a further imprimatur of approval by this Court in *Concord Township Appeal*, 439 Pa. 466, 268 A.2d 765 (1970).

[2] One of the most significant parts of the decision-making process to go ahead with large scale development, to undertake to spend the huge sums of "front end" money and to obtain the necessary financing, is the ability to engineer out all of the uncertainties in order to project costs and returns on investment. The more uncertainty, the more risk; the more risk, the less gets done. In this case it is not one of the superfluous products of American industry, but principally housing for the middle and working classes of Pennsylvania. The issue here involved the affordability of that housing which is again stirring controversy here and elsewhere. See Exhibit "C" attached hereto.

strong element of uncertainty into the planning process.[2] Both effects will drive up costs for a class or group of citizens already squeezed by declining industrial jobs, higher interest rates, and the export of work to lower wage countries.

The Planned Unit Development concept subsumed certain things which turned out to be true. The first was that large scale development is inherently different from small scale development. Because of that, there could be certain economies which could be shared between the producers, consumers and municipalities. The municipalities would get greater aggregates of open land, fewer roads, sidewalks, pipelines, etc. to maintain. The producers would get less road to build, higher densities and a better product to sell. The consumer would get better housing, more innovatively designed, in better surroundings at a lower price.[3] Almost all of the Planned Residential Developments in Pennsylvania, as elsewhere, are townhouse or substantially townhouse developments.

In this case the Court has created, by a one vote margin, a terrible dilemma for the producer which must inevitably adversely impact the consumer. By statute, the approval process is in two stages; the first stage is a preliminary one (which is called "Tentative Approval") and the second stage is called "Final Approval." In the Tentative Approval stage, all that is envisioned is that the plan, as presented, meets the legal criteria of the ordinance and that it is "feasible", that is capable of being done. The purpose of setting the "feasible" standard is to keep down the huge costs of "up front" engineering studies, surveys, borings, etc. The difference between the feasibility studies and final engineering can be hundreds of thousands of dollars. The protection to the local authorities is that Final Approval, upon which actual building permits are granted, cannot be obtained until the final engineering is done and pre-proven to be appropriate and effective. Final Approval is not given until all plans, specifications and details are fully

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[3] These are in contrast to "cookie cutter" subdivisions which are not only environmentally unsound, but very expensive to build and, hence, to sell. Even one acre subdivisions virtually require that almost every inch of the land be bulldozed. When constructed, Planned Development obviates much of this.

and completely engineered, reviewed and approved. Tentative Approval merely gives the producer an assurance that if the plan complies with all of the safeguards, Final Approval will be forthcoming. The key is that it is the Tentative Approval, and that assurance, which permits him to get financing, in most instances. That is not something at which to be sneezed! It is the vital link in the housing industry.

In this case, and traditionally, the determination of whether or not a sewer system will or will not work, or whether it will be approve or not approved, is determined by DER which acts under the guidelines of the Federal Environmental Protection Agency (EPA) and the Clean Streams Law.[4] Ultimately, the licensure of a sewer plant is DER's responsibility as is its continued operation, which is monitored by frequent inspections.[5] Here DER in effect gave its "Tentative Approval" and against that all that appears of record is that two lay persons stand up out of the audience, unsworn, neither parties nor witnesses, and voice unverified opinions as to an irrelevant fact which is used for the basis of the only Finding of Fact leading to the only Conclusion of Law that is fatal to the application.

The record shows that a registered professional engineer says the sewage system will work (Appellant's Reproduced Record, p. 53a) and DER says it will work. If this kind of refusal is to be affirmed in every application for Planned Residential Development, then any unfounded fear (to satisfy the "no development" types present in every community) may be relied upon by a municipality to deny otherwise perfectly legitimate housing opportunities. The only way the producer can avoid this is either not to go into Planned Unit Development, or to overload the "front end" and thus increase the cost to the consumer. Neither is good for the people of this Commonwealth and both are contrary to the

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[4] Act of June 22, 1937, P.L. 1987, 35 P.S. Sections 691.1 to 691.1001.

[5] See *Council of Middletown Twp. v. Benham*, 514 Pa. 176, 523 A.2d 311 (1987).

announced public policy of both the Courts and the legislature.

D. THESE ISSUES SHOULD BE DECIDED BY AS FULL A COURT AS POSSIBLE:

As noted, this was a 3-2 case. The decision here involves the affordability of housing to a major segment of our population and one of the dominant forms of that housing. It should have the attention of as full a court as possible. This case deserves as thorough an exegesis of the legal, social and economic issues as is possible under the circumstances. While the majority's decision turns on seemingly narrow grounds, those grounds have profound effects on the cost of housing, how much is built, how it is built and into which market; upper income, middle income, or working class income those housing dollars will flow. The ability of the present system to meet these needs is at stake. This decision is an important one and it deserves all the respect and attention it can be given.

Respectfully submitted,

/s/ Lenard L. Wolffe

Lenard L. Wolffe
45 Darby Road
Paoli, Pennsylvania 19301
(215) 647-6200
Attorney for Appellee,
Pocono Green, Inc.

AFFIDAVIT

Commonwealth of Pennsylvania :
: ss
County of Luzerne :

I, the undersigned Christopher L. Borton, being duly sworn according to law, doth depose and say that:

1. I am a principal in the firm of Borton-Lawson Engineering, a registered professional engineer, licensed by the Commonwealth of Pennsylvania by License No. PE 031473-E, and have been so licensed since 1982;

2. I am familiar with the requirements of the Pennsylvania Department of Environmental Resources ("DER") with regard to stream discharges from sewage treatment plants;

3. I have personally viewed the stream located at latitude 41 degrees 03'00, longitude 75 degrees 45'00", in Kidder Township, Carbon County, Pennsylvania;

4. On January 28, 1990, I personally observed said stream from the aforesaid latitude and longitude to where it flows into the Lehigh River;

5. Said stream does not end in a pond with no outlet;

6. Said stream flows from latitude 47 degrees 03'00", longitude 75 degrees 45'00" to an impoundment (commonly known as a "pond") created by a railroad embankment, which then discharges through a concrete arch culvert to the Lehigh River. On January 28, 1990, I observed an outlet flow of water from that impoundment into the Lehigh River approximately equivalent to the flow of water entering the impoundment;

7. Assuming, for hypothetical purposes, that said stream were to become dry at times, it is my professional opinion that, using available technology and equipment, it is feasible to construct and operate a sewage treatment plant that discharges treated effluent into said stream at said latitude and longitude which (i) will meet the applicable standards of the DER and (ii) will not be detrimental to the environment, the residents of the area where the stream is located, or all residents of Kidder Township, nor will such effluent place the public interest at risk or have an adverse effect on

the neighborhood surrounding the proposed planned unit development known as Pocono Green or said stream;

8. Said stream is shown on the map of the United States Department of the Interior Geological Survey ("USGS map") for the White Haven Quadrangle as a solid blue line from the aforesaid latitude and longitude to where it enters the east end of a pond or impoundment. At the west end of said pond the USGS map shows, by a solid blue line, a stream from said pond to the Lehigh River; and

9. Attached hereto as Appendix "A" are photographs which I took on January 28, 1990, showing the point of discharge from the aforesaid impoundment, or pond, into the concrete arch culvert and then into the Lehigh River.

/s/ Christopher L. Borton
Christopher L. Borton

Sworn to and subscribed
before me this 29th day
of January, 1990

/s/

_____
Notary Public

PHOTOGRAPHS



DOWNSTREAM END OF CULVERT LOOKING UPSTREAM (East) TOWARD POND



CONFLUENCE OF STREAM WITH LEHIGH RIVER, LOOKING WEST

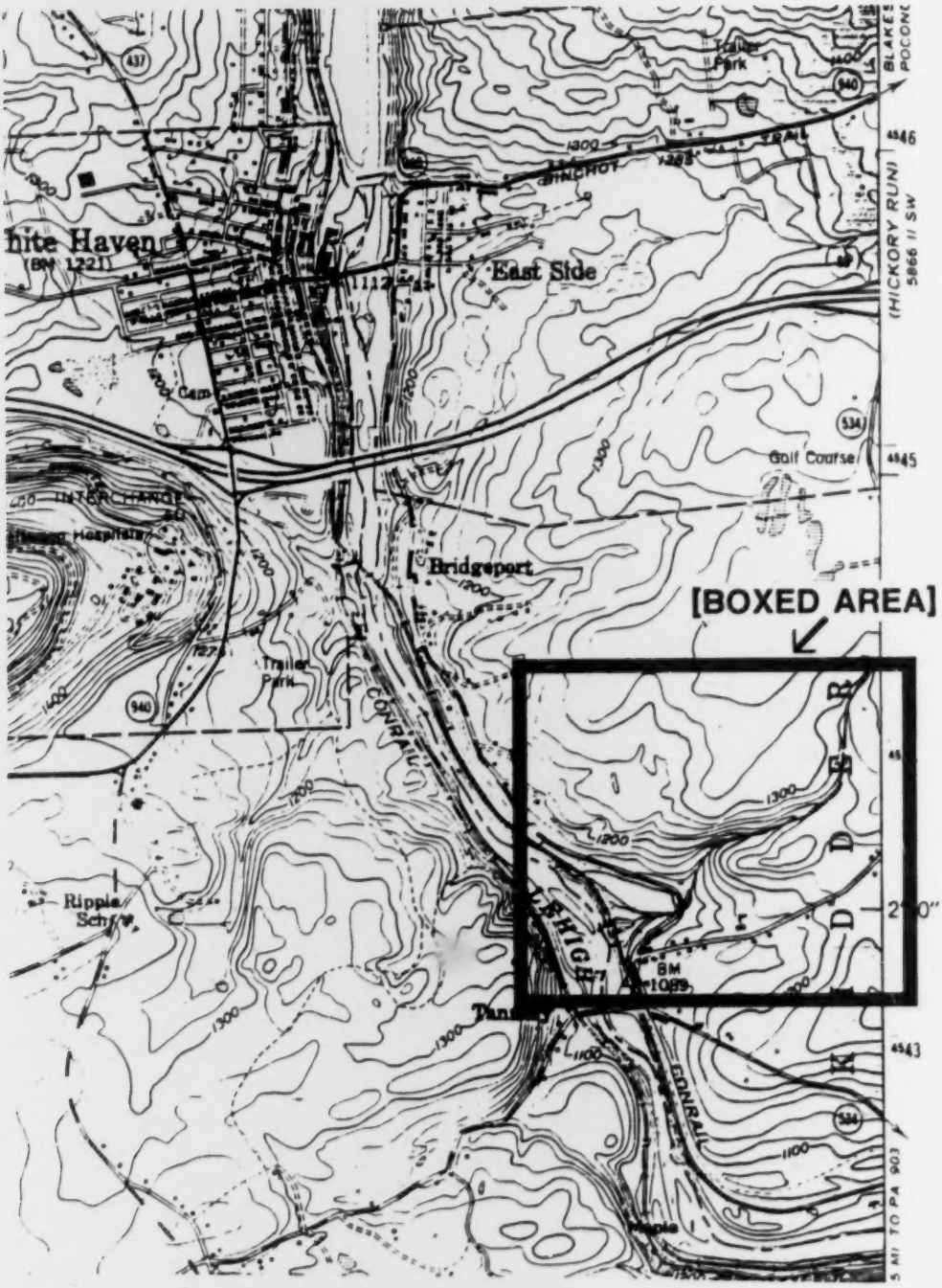


Exhibit B

(Area circled in yellow and stream highlighted in blue on original of Exhibit B are shown here in black-and-white only, within boxed area.)

(Exhibit C was not reproducible.)

APPENDIX C

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

August 29, 1990

Lenard L. Wolffe, Esquire
PROTNOFF, HOUPT & WOLFFE, LTD.
45 Darby Road
Paoli, Pa. 19301

RE: *Pocono Green, Inc. v. Board of Supervisors of Kidder Township, Appellant*
No. 3 E.D. Appeal Docket 1989

Dear Mr. Wolffe:

This is to advise you that the following Order has been endorsed on your Application for Reargument of Appellee Pocono Green, Inc., filed in the above captioned matter:

"August 22, 1990.

Denied.

Per Curiam".

Mr. Justice Larsen would grant reargument.

Very truly yours,

/s/ Marlene F. Lachman, Esq.
Marlene F. Lachman, Esquire
Deputy Prothonotary

/ma
cc: William E. McDonald, Esquire
Roger Nanovic, Esquire
Loudon L. Campbell, Esquire

APPENDIX D

POCONO GREEN, INC.,	:	IN THE COMMONWEALTH
	:	COURT OF PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
BOARD OF SUPERVISORS	:	
OF KIDDER TOWNSHIP,	:	
	:	
Appellee	:	No. 1549 C.D. 1987

BEFORE: HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE MADALINE PALLADINO, Judge
HONORABLE JACOB KALISH, Senior Judge

ARGUED: February 25, 1988

OPINION

BY SENIOR JUDGE KALISH FILED: June 29, 1988

Pocono Green, Inc. (developer) appeals from an order of the Court of Common Pleas of Carbon County which affirmed the Board of Supervisors of Kidder Township's (Board) denial of preliminary approval of its planned unit development. We reverse and remand.

The developer filed its application for preliminary approval of a planned unit development which contained information concerning the "feasibility" of proposals for the disposition of sanitary waste, and storm water. According to the developer's application for tentative approval, a privately-owned sewage plant would be installed at the development to handle all wastewater generated there.

The Department of Environmental Resources (DER), which is charged with the duty to approve or disapprove, gave its preliminary approval for the feasibility of the program. The developer relied on the testimony of John A. Burke, a professional engineer

who testified that the proposed sewage system was "feasible from an engineering standpoint." Notes of testimony at 47. However, his testimony indicated that he was not familiar with the flow of the sewage into the creek and pond. The Board of Supervisors of Kidder Township found that the stream into which the developer proposes an affluence discharge goes dry and that the stream runs into a pond from which there is no discharge of the water.

The developer contends that the Board abused its discretion in determining that the developer had not met its burden of showing feasibility. The court of common pleas, without taking additional testimony, sustained the Board.

Our scope of review is to determine whether the Board abused its discretion or committed an error of law. *Doran Investments v. Muhlenberg Township*, 10 Pa. Commonwealth Ct. 143, 309 A.2d 450 (1973). An abuse of discretion occurs where the result is manifestly unreasonable as upon a showing of fraud, bad faith, capricious action or is in capricious disregard of competent evidence. *Lily Penn Food Stores, Inc. v. Pennsylvania Milk Marketing Board*, 80 Pa. 266, 472 A.2d 715 (1984). Once an applicant shows compliance with the necessary criteria, it is an abuse of discretion to deny preliminary approval.

In support of its position, the developer argues that the Board had no authority to deny tentative approval to the development because the state preempted this field. In *Council Middletown Township v. Benham*, 514 Pa. 176, 523 A.2d 311 (1987), where this issue was raised, the court held that in analyzing the Sewage Act, the legislature did not intend to preempt this field.

Here, the proposed plan shows that a sewage plant will be installed at the development to handle all generated waste, thus conforming with requirements of section 701 of the Pennsylvania Municipalities Planning Code,[1] and the local ordinance. In addition, a letter from DER states that the proposal submitted, utilizing private water supply and distribution and for sewage treatment, is acceptable to DER.

The term feasibility means that there is substantial evidence to support a finding that the solution of a problem is likely to succeed.

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[1] Act of July 31, 1968, P.L. 805, as amended, 53 P.S. Section 10701.

The evidence that the developer presented on the question of sewage disposal consisted of the testimony of Mr. Burke and the approval of the system by DER, as contrasted to the testimony of two laypersons.

The Board abused its discretion in concluding that the developer had failed to sustain its burden of proving that the proposed sanitary waste disposal system was feasible. There was substantial evidence to support a conclusion of feasibility.

Accordingly, this matter is reversed and remanded to the common pleas court with instructions to enter an order directing the Board of Supervisors of Kidder Township to grant preliminary approval of the developer's planned unit development.

/s/ Jacob Kalish, Senior Judge
JACOB KALISH, Senior Judge

APPENDIX E

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL ACTION - LAW

POCONO GREEN, INC., Appellant	:	
vs.	:	No. 85-0805
BOARD OF SUPERVISORS OF KIDDER TOWNSHIP, Appellee	:	

Roger N. Nanovic, Esquire and Lenard L. Wolffe, Esquire — Counsel for Appellant

William E. McDonald, Esquire — Counsel for Appellee

OPINION

LAVELLE, P. J. - June 19, 1987

This is an appeal from a refusal to tentatively approve a subdivision plan.

On March 13, 1985, in accordance with Article VII of the Municipalities Planning Code, Act of July 31, 1968, P.L. 805, *as amended,* 53 P.S. Section 10701 *et seq.* (hereafter "Act"), Pocono Green, Inc. (hereafter "Developer") submitted an application to the Kidder Township Board of Supervisors for tentative approval of a proposed Planned Unit Development called Pocono Green (hereafter "Development"). After holding a public hearing on April 29, 1985, the Board concluded that there was "a lack of showing of feasibility of the proposed sanitary waste disposal

system" and denied tentative approval of the Development. Report of the Supervisors Pursuant to Pennsylvania Municipalities Planning Code and the Township Zoning, Subdivision and Land Use Ordinances and the Township Comprehensive Plan (hereafter "Report of the Supervisors"), p. 14. On appeal, the Developer challenges this conclusion as erroneous.

The matter was submitted to us on the record created before the Board. After reviewing the record, and after considering the briefs and oral arguments of counsel, we find that the Board committed no reversible error. We shall therefore deny the appeal and affirm the decision of the Board.

FACTS OF THE CASE

Pocono Green, Inc. (hereafter "Developer") is the equitable owner of an 88.769 acre tract of land (hereafter "tract") in Carbon County, Pennsylvania. The tract is an irregularly shaped parcel which straddles the border of two political subdivisions: 51.076 acres of the tract are in Kidder Township and 37.753 acres of the tract are in East Side Borough. The proposed Development would consist of two hundred (200) units in Kidder Township and two hundred and sixty-five (265) units in East Side Borough.

According to the Developer's Application for tentative approval, a privately owned "stream discharge" sewage treatment plant will be installed at the Development to handle all waste water generated therein. After the effluent is treated at the plant, it will be discharged into Slaughterhouse Creek (hereafter "creek"). It is the ability of this creek to handle the flow of effluent emanating from the proposed sewage treatment plant which is the focal point of this dispute.

DISCUSSION

On appeal from a decision by a governing body denying tentative approval of a Planned Unit Development, our scope of review is the same as in zoning cases. *Brauns v. Swarthmore Borough*, 4 Pa.Cmwlth. 627, 288 A.2d 830 (1972); *DeFeo v. Brookhaven Borough*, 3 Pa.Cmwlth. 377, 283 A.2d 505 (1971). Therefore, since we neither heard testimony nor received addi-

tional evidence on this matter, our standard of review is limited to determining whether the Board committed an error of law or an abuse of discretion. *Nascone v. Ross Township Zoning Hearing Board*, 81 Pa.Cmwlth. 482, 473 A.2d 1141 (1984); *Doran Investments v. Muhlenberg Township et al.*, 10 Pa.Cmwlth. 143, 309 A.2d 450 (1973).

In the present case, the Developer claims that the Board manifestly abused its discretion and committed positive errors of law in concluding that the Developer had failed to sustain its burden of proving that the proposed sanitary waste disposal system was feasible The Developer also contends that the Board lacked the authority to undertake an independent determination of the feasibility of the sewage system because: 1) this subject matter has been preempted by state law; and 2) the township has no ordinance which specifies the criteria by which the instant application could be judged. We will address these issues seriatum.

1. Feasibility of proposed sewage system

The Board made the following Findings of Fact concerning the feasibility of the proposed sewage system:

22. ... We find that the feasibility of the proposal for the disposition of sanitary waste has not been shown by the developer.
An issue was raised at the public hearing that the stream which the developer proposes an effluent discharge goes dry. A second issue was raised that said stream runs to a pond from which there is no discharge of water. The testimony of developer's engineer in addressing both of these issues is inconclusive and contradictory. Statements (as found in the record) were made by residents in the area of the stream on record that it does run dry and the pond does not discharge except in flooding.

23. We find after review of all the evidence presented that the developer failed to show that the proposed sewage treatment plant which will discharge into a stream which runs dry and leads into a pond that does not discharge [is] feasible.

Report of the Supervisors, p. 14.

Further, in its Conclusions of Law, the Board stated:

The evidence before the Board of Supervisors is sufficiently deficient in showing the feasibility of the proposed sanitary waste disposal system.

Report of the Supervisors, p. 14.

The Developer challenges these Findings of Fact as an abuse of discretion and the Conclusion of Law as erroneous. The Developer argues that, on the contrary, "[t]he feasibility of Appellant's proposed sanitary waste disposal system was established by competent and relevant evidence by the Appellant's engineer and the [Pennsylvania] Department of Environmental Resources...[and] [t]here was no relevant and competent contrary evidence whatsoever." Appellant's Notice of Appeal, p. 3. We disagree.

The threshold issue here is the meaning of the term "feasibility" as that term is contemplated in the Act. Our independent research has revealed that neither the Act nor any Pennsylvania appellate case law provide a definition of that term to guide us. We are, therefore, guided by the polestar principle that, where a statutory term is not defined, we must look to the common and approved usage of that term. 1 Pa.C.S.A. Section 1903; *Commonwealth v. Stanley*, 498 Pa. 326, 446 A.2d 583 (1982).

Black's Law Dictionary defines the term feasible, the root of feasibility, as "[c]apable of being done, executed, or affected or accomplished. Reasonable assurance of success." *BLACK'S LAW DICTIONARY*, p. 549 (Fifth Edition, 1979). Feasible is also defined, *inter alia*, as "[c]apable of being utilized or dealt with successfully; suitable." *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE*, p. 480 (1971).

An Oregon court, in determining whether to grant preliminary approval to a Planned Unit Development has defined the term feasibility to mean more than possibility from a technical engineering perspective. *Meyer v. City of Portland*, 67 Or.App. 274, 678 P.2d 741 (1984). Instead, feasibility means that there is substantial evidence supporting a finding that the solution to certain problems posed by a project are possible, likely and reasonably certain to succeed. *Id.* Finding these definitions logical and relevant, we adopt them.

Here, to establish the feasibility of the proposed sewage system, the Developer relied on the testimony of John A. Burke, a registered professional engineer. Mr. Burke testified that the proposed sewage system was "feasible from an engineering standpoint". (N.T. 4/29/85, p. 47). However, as we have already concluded in this Opinion, feasibility as contemplated in the Act

means more than merely feasible from a technical engineering perspective. Rather, it means that solutions to problems posed by the project are reasonably likely to succeed. Therefore, to discover whether there was substantial evidence that the proposed sewage system was feasible, we must closely examine the remainder of Mr. Burke's testimony.

The Board permitted several nearby residents who attended the public hearing to question Mr. Burke. The record reveals the following:

BY MR. LES HERLING:

Q: . . . I live directly alongside the creek they are talking about pumping sewage down....So it's going to be a stagnant pond down there.

MR. BURKE: Doesn't it discharge from the pond?

Q: It doesn't have enough water in it. It's going to lay there. You are going to have a source of water laying there. If you want to take a ride and check the creek now, there is barely a trickle of water going through it now.

MR. BURKE: Yes, we will have to do that, certainly.

Q: That creek goes right into a pond, right at the Tannery.

MR. BURKE: I think I noticed that.

N.T. 4/29/85, pp. 64-65.

MR. BRADY: The creek you are speaking of does run into my pond and there is no outlet, only when you have a flood, because when the creek goes dry, the pond goes dry, so if your creek goes dry —

MR. BURKE: Right now, isn't there some discharge out of that pond?

MR. BRADY: No.

• • •

MR. BURKE: Well, you could see the problems we would have with DER, getting this worked out, no doubt about it.

N.T. 4/29/85, pp. 69-71.

Mr. Burke's testimony indicates that he was not fully aware of the year round flow of the creek and the discharge from the pond. This lack of knowledge in this fundamental area seriously impaired his credibility as a witness and the Board could have rejected his testimony completely. The Board could have properly found that Mr. Burke had not fully investigated all the potential problems the proposed sewage treatment plant would pose and concluded that there was considerable doubt as to the likelihood of its success. Since the Developer relied on Mr. Burke's testimony to show that the proposed sewage system was feasible, the Board committed neither an error of law nor an abuse of discretion in concluding that the Developer had failed to present substantial evidence that the sewage system is feasible. Although the Developer also submitted into evidence a letter from D.E.R. (Applicant's Exhibit No. 6) which stated that the Developer's preliminary proposal was "acceptable", this letter specifically stated that any other state and local requirements had to be met. This letter did not support the Developer's contention that the sewage system was feasible.

The Developer contends that the Board erroneously relied on incompetent "testimony" from two area residents who attended the meeting and questioned Mr. Burke about the creek and pond. However, we need not reach any issue regarding the testimonial competence of the questions posed to the engineer by the residents because it is unnecessary to our disposition here. As the Board correctly stated, the testimony of Mr. Burke was "sufficiently deficient" without reference to any other testimony, competent or not. Mr. Burke's testimony, standing alone, simply failed to supply substantial evidence to support a finding that the creek was capable of handling the effluent discharged from the proposed sewage treatment plan.

Although we found no Pennsylvania appellate cases on point, there is language, albeit dicta, from the appellate courts which, in our view, supports our conclusion here. The instant case is factually similar to *Rees v. Board of Supervisors of Indiana Township*, recently addressed by our distinguished colleague, Administrative Judge Emil Narick, sitting in the Allegheny Court of Common Pleas. In that case, the Board denied the application for tentative approval of a Planned Unit Development because, *inter*

alia, "the proposed sewage disposal plant is not acceptable because of a serious question as to the flow of Rawlins Run Creek which is not deemed appropriate to accept the effluent". *Rees v. Board of Supervisors of Indiana Township*, _____Pa.Cmwlth. _____, 513 A.2d 584 (1986).

The Board's decision was appealed to the Court of Common Pleas. *Id.* However, after the filing of the appeal, the appellant and the Board negotiated an Agreement under which the Board would grant tentative approval provided certain conditions were met. *Id.* In light of this Agreement, Judge Narick opined:

> The only substantial objection cited by the Board in its decision to deny the application has been satisfied by one of the conditions set forth in the settlement agreement. *We agree with the Board that the testimony from residents indicating that the creek into which appellant planned to discharge effluents flows only intermittently during the summer months raised a question as to the feasibility of the private on-site sewage disposal system.* However, appellant has agreed to use the township's public sanitation system, rather than the proposed private system. We therefore need not decide whether possible problems with the adequacy of the private system would be grounds to sustain the denial of the application....

Rees v. Board of Supervisors of Indiana Township, 39 D. & C.3d 101, 102-103 (Allegheny Co. 1985). (emphasis ours)

On appeal, the Commonwealth Court stated:

> [W]e agree with the [trial court], that *aside from the sewage disposal issue*, the Board erred in determining that a PRD [Planned Residential Development] was not permitted in the location in question. (citations omitted). We likewise agree that the trial court was correct when it held that the Agreement satisfied the only *valid objection* to the PRD *(the matter of sewage disposal)* and properly held that the Agreement was legally sufficient to authorize approval of the PRD.

Rees v. Board of Supervisors of Indiana Township, _____ Pa. Cmwlth. _____, 513 A.2d 584, 586 (1986).

This language indicates that both the Court of Common Pleas of Allegheny County and the Commonwealth Court considered not feasible a sewage system which flowed into an intermittently dry creek. We find *Rees* to be apposite to the present case.

2. Preemption

The Developer also contends that the Board had no authority to deny tentative approval to the Development because

the field of sewage regulation has been preempted by the legislature's enactment of the Sewage Facilities Act nd the Clean Streams Law. In support of this contention, the Developer submitted a post-argument Memorandum of Law citing the Pennsylvania Supreme Court's recent Opinion in *Council of Middletown Township v. Benham*, _____Pa. _____, 523 A.2d 311 (1987). *Benham* is factually similar to the case at bar because it also dealt with an application for tentative approval of a Planned Unit Development. The Developer's interpretation of *Benham*, however, is clearly erroneous.

Benham specifically held that "the legislature's enactment of the Pennsylvania Sewage Facilities Act [Act of January 24, 1966, P.L. 1535, *as amended*, 35 P.S. Sections 750.1 - 750.20]...and the provisions of the Clean Streams Law [Act of June 22, 1937, P.L. 1987, *as amended* 35 P.S. Section 691.1001] which deal with sewage systems have not wholly preempted these fields from local zoning regulations". *Id.* at ___, 523 A.2d at 312.

The *Benham* Court, specifically addressing the Sewage Facilities Act, concluded that "the legislature plainly intended to combine state and local power into a comprehensive regulatory scheme for sewage disposal". *Id.* at ___, 523 A.2d at 313. Further, although the Developer cites *Benham* for the principle that enactment of the Clean Streams Law has limited the powers of a municipality in the area of sewage disposal to certain specified ministerial tasks, such as, *inter alia*, inspection of sewage facilities (See Developer's Memorandum of Law, pp. 2-3), in our view, no portion of the *Benham* decision can be reasonably cited for this principle. Although the *Benham* Court included the Clean Streams Law in its "no preemption" holding, quoted *supra*, that Court specifically declined to further address that Law stating that it did "not believe that that law [was] germane to the preemption discussion". *Id.* at ____, 523 A.2d at 313, ftnote 6.

Benham makes undeniably clear that the legislature, in enacting both the Sewage Facilities Act and the Clean Streams Law, has not placed the field of sewage disposal regulation beyond the pale of local regulation. Indeed, *Benham* re-emphasizes that a local municipality's power to regulate in this field is part and parcel of the overall state legislative scheme.

3. Absence of ordinance

The Developer also argues that the lack of specific provisions in any Kidder Township ordinance as to the requirements a Developer must meet to show feasibility for a proposed sewage system means that only the standards of state agencies are applicable, and thus, if the sewage system is approved by the Department of Environmental Resources, the Board does not have the authority to undertake an independent determination of the feasibility of the sewage system. We disagree.

Article VII of the Municipalities Planning Code, Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. Section 10701 *et seq.*, was enacted by the legislature to "encourage innovations in residential development". 53 P.S. Section 10701 Section 702 of that Act provides that "[t]he governing body of each municipality *may* enact, amend and repeal ordinances fixing standards and conditions for planned residential development". 53 P.S. Section 10702. (emphasis added).

Section 702, by its own unambiguous language, does not mandate that every municipality must enact an ordinance prescribing standards for granting tentative approval of an application for a Planned Unit Development. *Kaufman and Broad, Inc. v. Board of Supervisors of West Whiteland Township*, 20 Pa.Cmwlth. 116, 340 A.2d 909 (1975). The "creation of a PRD section in an ordinance is left to the discretion of the [municipality]" and "no one can compel their enactment". *Id.* at 122, 340 A.2d at 912. Instead, the Act merely prohibits a municipality, which chooses to enact such an ordinance, from imposing conditions on the grant of tentative approval which are inconsistent with those provided in the Act. See 53 P.S. Sections 10705, 10707.

Admittedly, Kidder Township does not have a specific ordinance promulgated under Article VII detailing the requisites for making a showing of feasibility of a proposed sewage disposal system, which makes this case one of first impression in this Commonwealth. However, contrary to the Developer's argument, in our view, it was not the legislature's intent in enacting Article VII to give a Developer, in the absence of such an ordinance,

carte blanche in meeting the statutory requirements for securing tentative approval. In this vein, we note that even where there is such an ordinance, and all the requirements contained therein have been met, a municipality may still deny tentative approval if it serves the public interest. See *Doran Investments v. Muhlenberg Township, supra.* Therefore, we hold that, even in the absence of an ordinance detailing the requirements for showing feasibility of a proposed sewage system under Section 702, a Developer must show the feasibility of a proposed sewage system by competent and relevant evidence before tentative approval can be granted to a Planned Unit Development. As we stated previously in this Opinion, the Developer failed to meet this burden in the instant case.

For the foregoing reasons, we enter the following

ORDER

AND NOW, this 19th day of June, 1987, it is hereby ORDERED and DECREED that the Appeal of Pocono Green, Inc. is DENIED and the Decision of the Board of Supervisors of Kidder Township, denying tentative approval to a Planned Unit Development is AFFIRMED.

Costs on Appellants.

BY THE COURT:

/s/ John P. Lavelle
P.J.

APPENDIX F

BEFORE THE SUPERVISORS OF KIDDER TOWNSHIP, CARBON COUNTY, PENNSYLVANIA

In re: Application for Tentative Approval of a Planned Unit Development known as "Pocono Green" by Pocono Green, Inc.

REPORT OF THE SUPERVISORS PURSUANT TO PENNSYLVANIA MUNICIPALITIES PLANNING CODE AND THE TOWNSHIP ZONING, SUBDIVISION AND LAND USE ORDINANCES AND THE TOWNSHIP COMPREHENSIVE PLAN

The following report is being submitted upon consideration of the entire record made in connection with the application for preliminary approval of the Planned Unit Development known as "Pocono Green". This record includes, inter alia, the application forms, plans, notes of testimony and exhibits offered at the public hearing on application for preliminary approval, duly advertised, and held on April 29, 1985.

The proposed development is in a R-2 zoning district and is situate on a total 88.769 acre tract. 51.016 acres are located in Kidder Township and 37.753 acres are located in East Side Borough. The development is located immediately south and west of Pocono Hershey Golf Course, which is west of Tannery Road (L.R. 13040) and south of U.S. Interstate I-80, and is situate between the Pocono Hershey Resort Golf Course, Commonwealth of Pennsylvania State Game Lands, and private individual owners. The plan encampasses four hundred sixty five (465) dwelling units consisting of two hundred (200) units Kidder Township and two

hundred and sixty-five (265) units in East Side Borough with various amenities for the residential users.

The Kidder Township Planning Commission, upon consideration and review, recommended tentative approval of the application subject to various conditions as listed in its letter dated April 22, 1985 (Township Exhibit No. 5).

FINDINGS OF FACT

Based upon the testimony and other evidence received at the public hearing, we enter the following Findings of Fact:

1. An application for preliminary approval of a Planned Unit Development known as "Pocono Green" was filed with Township of Kidder under the terms and provisions of the Pennsylvania Municipalities Planning Code (Pa. M.P.C.), Act of July 31, 1968, P.L. 805, Art. VII, Section 701, 53 P.S. 10701, et seq., as amended, the Kidder Township Subdivision and Land Development Ordinance, as amended, the Kidder Township Zoning Ordinance, as amended, and the Kidder Township Comprehensive Plan.

2. The application was made by the Developer, Pocono Green, Inc., as equitable owner of all land shown on the Development Plan and as the "land owner" as defined by the Pa. M.P.C., Section 107 (12).

3. The land which is the subject of this application is one (1) tract containing a total of 88.769 acres. 51.076 acres are located in Kidder Township and 37.753 acres are located in the East Side Borough. The tract is depicted on the Plan documents.

4. The application contained the following information as required by the Pa. M.P.C.;

A. The location, size and topography of the site;

B. The nature of the land owner's interest in the land proposed to be developed;

C. The density of the land use to be allo-

cated to parts of the site to be developed;

D. The location and size of the common open space being 29.98 acres throughout.

E. The entity proposed to own and maintain the common open space;

F. The use, approximate bulk and location of buildings and other structures which consist of low-rise units as defined by the Ordinance arranged in clustered design patterns;

G. Information on the feasibility of proposals for the disposition of sanitary waste and storm water;

H. The substance of grants of easements for public utilities;

I. The provisions for parking of vehicles;

J. The location and width of proposed streets and public ways;

K. A written statement by the land owner setting forth the reasons why, in its opinion, a PUD would be in the public interest and would be consistent with the comprehensive plan for the development of the municipality.

5. The application did not contain the following information as required by the Pa. M.P.C.:

A. Height of buildings;

B. Feasibility of proposals for energy conservation and effective utilization of renewable energy sources;

C. The required modifications of municipal land use regulations, although evidence in this regard was submitted at the public hearing on this matter.

6. A public hearing was held before the Kidder Township Board of Supervisors on April 29, 1983, in accordance with Pa. M.P.C., Section 708.

7. The applicant appeared, represented by counsel who entered his appearance of record for the land owner-applicant.

8. The following witnesses appeared for the applicant in support of the application:

A. James Rothstein, Esquire, President and principal owner of Pocono Green, Inc., said corporation being the developer and equitable land owner for the proposed development;

B. James Carr, of the Martin Organization, Philadelphia, Pennsylvania, architect and land planner;

C. John Burke, registered professional engineer and registered land surveyor of the firm Smith, Miller and Associates, Engineers and Architects of Kingston, Pennsylvania.

9. The following witnesses appeared for the Township with reference to the application:

A. Gary Sohosky, golf professional at the Hershey Pocono Resorts.

10. The development is consistent with the comprehensive plan for the development of Kidder Township in that the housing units, roads and utilities have been arranged with respect to the slope and recommended uses for the area, it being in an R-2 residential zone.

11. The Plan documents depart from the Kidder Township Subdivision and Land Development Ordinance (1971) and the Kidder Township Zoning Ordinance provisions (other than Article 4, Subsection 4.403 Use Class 14 - Planned Unit Development) as follows:

A. The rear set back requirement of thirty (30') feet as not been met. The Plan must show sufficient rear set back from the property lines as to not adversely effect adjacent property owners. This requirement would be a condition of any tentative preliminary plan approval;

B. The minimum lot characteristics for area serviced by central water and central sewer facilities is thirteen thousand (13,000) square feet with a minimum eighty (80') foot width. The Plan would convey only land area beneath the dwelling units and a minimal in front and rear. We find the adequate provision for common open space and recreational area on the Plan available to each dwelling unit to suffice for minimum lot requirements under the conventional zoning regulations;

C. The Plan depicting a main cul-de-sac

roadway violates the provisions for cul-de-sac streets under the Kidder Township Subdivision and Land Development Ordinance. We find this to create a serious problem for ingress and egress to the within development in the event it is blocked at any given point. In the instance of fire or other emergency, this situation could create a serious danger to life and property and thus would not be in the public interest. Any plan to be given tentative approval would have to provide an alternate roadway system for vehicular traffic other than the main roadway ending in a cul-de-sac as shown on the present plan.

12. The Kidder Township Zoning Ordinance, as amended, Article 4, Basic District Regulations: Section 4.300 Use Classes and Zoning Districts, Use Class 14 Planned Unit Development would apply in the present case. The P.U.D. meets the requirements of maximum land coverage by building of 20%, being 11.7% in this P.U.D. and land coverage by all development of 30%, being 27.4% in this P.U.D. The public recreation area requirement is three hundred (300) square feet per house unit and the development meets this requirement by providing three hundred fifty nine (359) square feet per dwelling unit.

13. In compliance with Article 4 of the Kidder Township Zoning Ordinance for Planned Unit Developments, we find from the evidence submitted that there is a sufficient market for the type, size and character of the development proposed.

14. Easements for electric, telephone and cable services will be provided by the regulated utilities in the normal and usual manner.

15. The Plan provides for adequate pedestrian and vehicular circulation facilities including roadways, driveways, sidewalks and landscaped areas, except for the portion of the entrance to the development which intersects the Pocono Hershey Resort Golf Course. We find that vehicular and/or pedestrian traffic in that vicinity is extremely hazardous because of the use made by patrons of the golf course driving golf balls and golf carts

across the main roadway. Any tentative approval would be subject to a condition that the developer make assurances to the Township that it will take whatever means are necessary to eliminate hazard to vehicular and/or pedestrian traffic using the main artery roadway into the development from Legislative Route 13040. The roads shown on the Plan are of the correct right-of-way and pavement width.

16. The purpose of common open space is to provide for separation of various clusters of houses, visual enjoyment, separation for circulation of air and light. a sense of privacy and to preserve as much of the natural terrain and tree growth as possible. The common open space also serves the purpose as a site for certain active recreational uses. We find that the recreational area located in Kidder Township but not adjacent to the development to be minimumly adequate to meet the recreational and common open space needs of development located in Kidder Township. The "Recreation Area C" as shown on the preliminary plan is far removed from Kidder Township. The common open space requirement of twenty-five (25%) percent for each residential district (common open space as defined by the Zoning Ordinance) has been met in Kidder Township.

A condition of any tentative preliminary plan approval would require compliance with common open space and density requirements of our Ordinance once recreational facilities and all parking spaces related thereto are specified on a plan.

17. All the common open space with the exception of water and sewer facilities will be owned by applicant and the plan covenants make provision for permanent maintenance and preservation of such common open space including recreation space. The developer has indicated that the common open space will be placed in a trust providing for permanent maintenance and preservation (Note: A trust agreement in its entirety must be satisfactory to the Supervisors before any final approval of any plan).

18. The plan proposes that all roads are to be paved. We find pertinent questions have been raised concerning the adequacy of surface drainage in the area of the entrance to the

development as well as adequacy to handle storm water erosion and dust formation throughout the entire development. These questions have not been satisfactorily answered at this time by developer's engineer. A complete erosion and sediment control plan would be a condition of any tentative preliminary approval of this plan. There has been no certification by applicant's engineer that the surface and subsurface conditions of development will not cause damage to property or life and this likewise would be a condition of any tentative preliminary plan approval.

19. The developer has shown clustered housing and all height requirements of the zoning ordinance will be met. There appears adequate light and air in proper building spacing.

20. The Plan shows a general commercial area. The specific use of that commercial area must be represented to the Township and fall within the Kidder Township Zoning Ordinance Article 4 Use Class 14 (k) Commercial Uses.

21. In accordance with Zoning Ordinance, Article 4,the Plan calls for natural features and existing trees to be preserved whenever possible.

22. Article 4 of the Kidder Township Zoning Ordinance provides there can be no habitation of any portion of the development until the residential use types are attached to a centralized water system and a centralized sewage disposal system. The Municipalities Planning Code indicates that municipalities shall determine the feasibility of proposals for the disposition of sanitary waste and storm water as being in the public interest. We find that the feasibility of the proposal for the disposition of sanitary waste has not been shown by the developer.

An issue was raised at the public hearing that the stream into which the developer proposes an effluent discharge goes dry. A second issue was raised that said stream runs to a pond from which there is no discharge of water. The testimony of developer's engineer in addressing both of these issues is inconclusive and contradictory. Statements (as found in the record) were made by residents in the area of the stream on record that it does run dry and the pond does not discharge except in flooding.

23. We find after review of all evidence presented that the developer failed to show that the proposed sewage treatment plant which will discharge into a stream which runs dry and lead into a pond that does not discharge to be feasible.

24. The area designated for "support facilities" on the Plan is not owned by applicant and any tentative preliminary plan approval would be subject to written documents submitted for review by the Township allowing that area to be used for support facilities of the development in perpetuity.

25. Since the sewage disposal system is one system proposed for both East Side Borough and Kidder Township, with the sewage treatment plant to be located in Kidder Township, before there is any joint hookup it would be a condition of any preliminary approval that an agreement be reached between East Side Borough and Kidder Township (or if such an agreement is not made that a court has made a determination) as to the rights and responsibilities of each municipality in the event the utility established by the developer becomes defunct or is unable to properly operate the sewage treatment plant and system. Such requirement would be in accordance with the provisions of both the Borough Code and the Second Class Township Code.

26. The Plan suggests a centralized water system. Proof that the configuration of the system itself would be adequate to serve the development would be a condition of any tentative preliminary plan approval. Also, a hydrological study and any other reasonable proof the Township feels necessary would be required. Such evidence would indicate that the water table in the area, considering existing water use in that area, is sufficient to provide adequate water to the entire development (located in both East Side Borough and Kidder Township since wells are proposed in Kidder Township only). This water supply must be adequate to accommodate domestic water use, water for fire fighting, and water for the proper operation of the sewage treatment plan and sewage system proposed. In addition, certifications and permits from all appropri-

ate agencies as to the adequacy of the sewage disposal system and the water supply system (including any permit from the Delaware River Basin Authority) would be required prior to any final approval.

27. The proposed development is located between the Pocono Hershey Resort Golf Course and state game lands as well as other vacant land owned by private owners. The Township finds this development not out of character with the neighboring areas.

28. With respect to Article 4 of the Kidder Township Zoning Ordinance Use Class 14 Planned Unit Development, off-street parking is provided for by the Plan at a two-to-one ratio with each space to be ten feet by twenty feet (10' X 20') as required. We find certain parking areas too far removed from the respective housing units and would require their placement closer to the units in any plan approval.

29. The tax impact of the proposed development will not be adverse to the Township, School District or County and, in fact, should be a benefit.

30. We find the comments of the Township engineer in his letter of March 27, 1985 (Township Exhibit No. 4) to be well founded and would require compliance with those objections as a condition of any tentative preliminary plan approval.

31. We find from the evidence presented that serious questions exist as to the adequacy of the fire protection system presented. However, the system was represented by developer's engineer as being in compliance with the National Fire Protection Association standards. Since the entire system would be delineated in a final

plan submission, a condition of any tentative preliminary plan approval would require a certification from the National Fire Protection Association that the proposed fire system is in compliance with its Code requirements for the type of clustered housing shown on the development plan.

CONCLUSIONS OF LAW

The proposed planned unit development known as "Pocono Green" meets some of the criteria as set forth in Article VII of the Pennsylvania Municipalities Planning Code, the Kidder Township Comprehensive Plan, the Kidder Township Subdivision and Land Use Ordinance (1971), and the Kidder Township Zoning Ordinance specifically Section 4, Use Class 14, Planned Unit Development, as amended. However, there are certain criteria of that Act and Ordinances specified above that are not met and would be conditions, as previously discussed, of any tentative preliminary plan approval.

The evidence before the Board of Supervisors is sufficiently deficient in showing the feasibility of the proposed sanitary waste disposal system, being a stream discharge sewage treatment plant. A proposed system which discharges into a stream which often runs dry and leads into a pond with no discharge point is detrimental to the environment, the immediate residents of the area, and all residents of Kidder Township in general.

DECISION

It is decided that the preliminary plan of Pocono Green as submitted is rejected based on the foregoing Findings of Fact and Conclusions of Law with respect to a lack of showing of feasibility of the proposed sanitary waste disposal system.

Accordingly, the Township Secretary is directed to certify a copy of these Findings of Fact, Conclusions of Law and Decision and mail the same to the land owner.

Dated this 17th day of June, 1985.

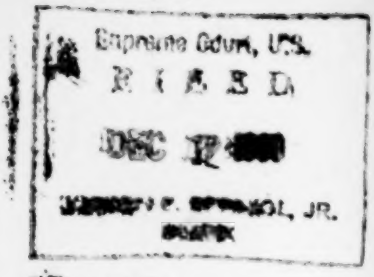
KIDDER TOWNSHIP BOARD OF SUPERVISORS

By:/s/ Kenneth J. McGeehan
Kenneth J. McGeehan
Chairman

/s/ H. Elizabeth Davis
H. Elizabeth Davis

/s/ Charles Getz
Charles Getz

90-796



No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

POCONO GREEN, INC.,

Petitioner,

vs.

BOARD OF SUPERVISORS OF KIDDER TOWNSHIP, PENNSYLVANIA,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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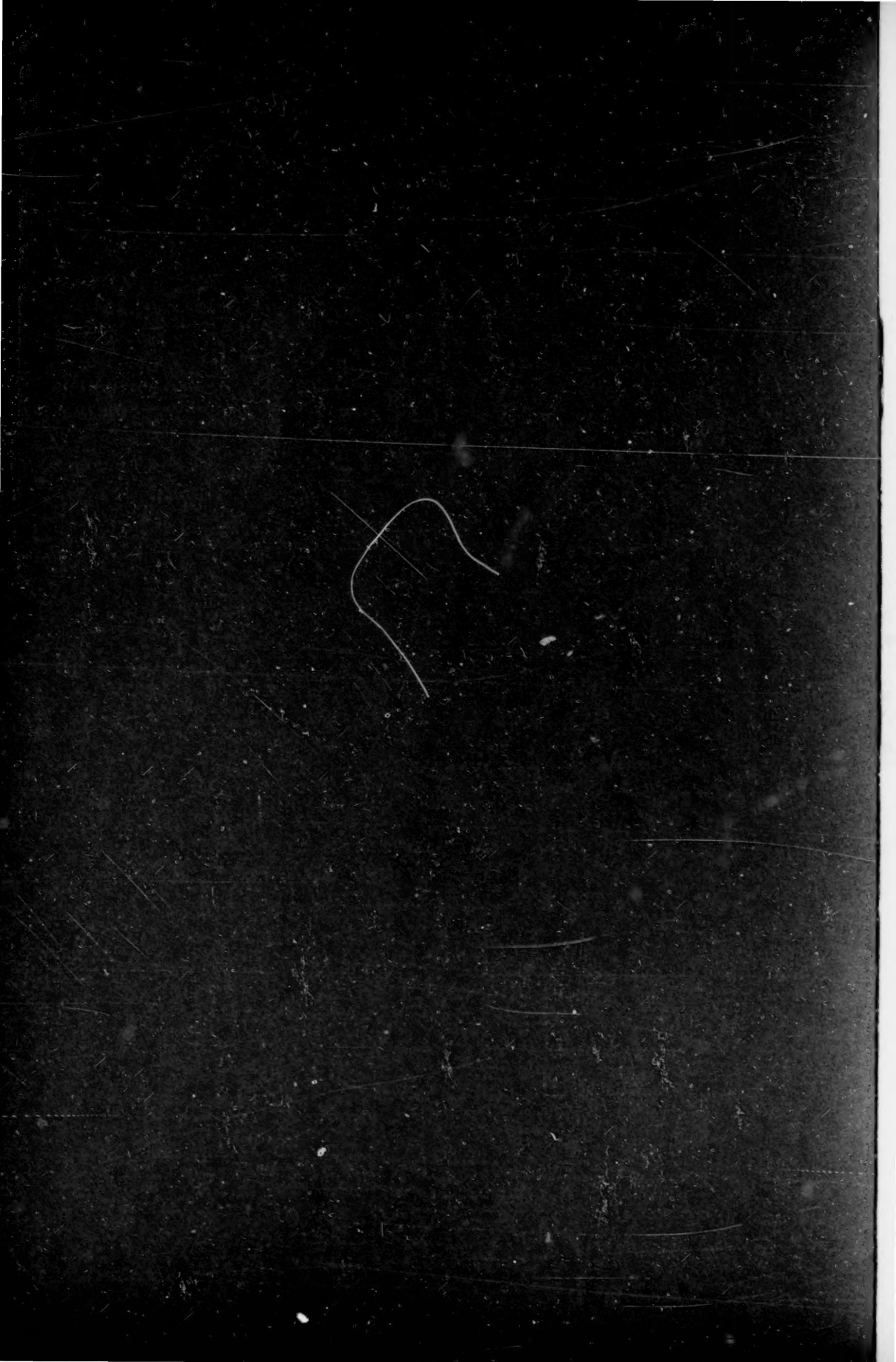


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In re Dorrance's Estate, 309 Pa. 151, 163 A. 303, cert. denied sub nom. Dorrance v. Commonwealth of Pennsylvania, 287 U.S. 660 (1932), reargument denied, 172 A. 900 (Pa.), cert. denied, 288 U.S. 617 (1933)	10, 12
Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986) . .	17, 18
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Petitioner Pocono Green, Inc. ("Pocono Green") has filed a petition seeking a writ of certiorari to the Pennsylvania Supreme Court. Pursuant to Sup. Ct. R. 15, Respondent Board of Supervisors of Kidder Township, Pennsylvania, ("the Board") hereby submits this brief setting forth the reasons why certiorari should be denied.

I. THIS COURT LACKS SUBJECT-MATTER JURISDICTION.

Pocono Green's petition invokes this Court's jurisdiction under 28 U.S.C. § 1257(a). See Petition for Certiorari at 1.[1] Section 1257 vests this Court with subject-matter jurisdiction to review state court judgments where, in pertinent

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[1]Page references to Pocono Green's petition will be designated by the reference "Petition for Certiorari at ___." Page references to the appendix attached to Pocono Green's petition will be designated by the reference "(App. at ___)."

part, "any . . . right, privilege, or immunity is specially set up or claimed under the Constitution . . . of . . . the United States." Because of the requirement that any constitutional issue to be addressed by this Court have been "specially set up or claimed" in the proceedings sought to be reviewed, "[i]t is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record shows either expressly or by clear implication that the federal claim was adequately presented in the state system." Webb v. Webb, 451 U.S. 493, 496-97 (1981).

In the present case, Pocono Green attempts to bait the hook of certiorari with a procedural due process issue. However, Pocono Green did not adequately present, nor did the Pennsylvania Supreme

Court pass upon, this issue below.

In Pocono Green's three briefs below--to the Court of Common Pleas, to the Commonwealth Court, and to the Pennsylvania Supreme Court[2]--Pocono Green did not even hint at, let alone argue, the existence of any due process issues arising under the due process clause of the United States Constitution. The phrase "due process" does not appear anywhere in Pocono Green's briefs. Only once, indeed, is the word "constitution" even mentioned, and this passing reference occurs in the context of a discussion concerning the interpretation of Penn-

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[2]Copies of these briefs are attached in an appendix hereto. Because the attached appendix supplements the appendix accompanying Pocono Green's petition, pages in these briefs will be designated by the reference "(Supp. App. at ___)."

sylvania zoning ordinances.[3] At each step of the proceedings below, in other words, Pocono Green relied exclusively on Pennsylvania state law. Not surprisingly, therefore, all three of the opinions below ruled exclusively on matters of Pennsylvania state law.

The procedural due process theory was drummed up as an afterthought. Not until filing its application for reargu-

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[3]In its brief to the Court of Common Pleas, Pocono Green remarked, "in order to remain constitutional, zoning ordinances [are] required to have preannounced, objective criteria so that owners of land . . . know what [is], and [is] not, permitted" (Supp. App. at A-24 to A-25). In context, this offhand allusion appears to refer to the Pennsylvania rather than to the United States Constitution. But even if Pocono Green meant to refer to the latter document, the reference was too ambiguous to preserve the issue. See Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 78 (1988) ("even if the Mississippi Supreme Court understood appellant to be offering a constitutional challenge, it may very well have taken that challenge to be anchored in the State Constitution").

ment with the Pennsylvania Supreme Court did Pocono Green for the first time raise this issue (App. at 13a-14a). The Pennsylvania Supreme Court, without opinion, denied the application (App. at 26a).

As illustrated by Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988), Pocono Green's last-minute ploy was too little, too late. The petitioner in Banker's Life sought to have this Court review a punitive damages award on the ground that the size of the award violated several provisions of the United States Constitution, among them the due process clause. Id. at 76. In its appeal to the Mississippi Supreme Court, though, the petitioner had not mentioned these constitutional issues. Only in its petition for rehearing with the Mississippi Supreme Court, which was denied without opinion, did the petitioner raise

them for the first time. Id. at 75-76. This Court declined to consider the issues because "these claims were not raised and passed upon in state court." Id. at 76. Such is likewise the situation here.

II. BECAUSE THE ISSUES RAISED BY POCONO GREEN WERE NOT PRESENTED OR PASSED UPON BELOW, THIS COURT SHOULD DENY CERTIORARI.

Admittedly, there exists some uncertainty whether the "not raised or passed upon" rationale for denying certiorari is jurisdictional or merely prudential. See Illinois v. Gates, 462 U.S. 213, 218-19 (1983). But even if the rationale were deemed to be merely prudential, a number of compelling policy factors identified in Webb v. Webb, supra, 451 U.S. at 499-501, compel the same result.

First, the principle of comity in our federal system dictates that state courts be afforded the initial opportunity to pass upon issues which are later urged as a basis for overturning the state courts' judgments. Moreover, only by insisting that issues be raised during the state proceedings can this Court assure that a record is developed sufficient for the issues to be addressed in a meaningful fashion later on. The "not raised or passed upon" rationale also insures that if there are independent and adequate state grounds that would pretermit the federal issues, they will be identified and ruled upon. Finally, if the parties to state court litigation are forced to present their federal claims to the state tribunals in the first instance, those issues will be adjudicated by the state courts where necessary to

dispose of the case. In many instances, such a judgment will be supported by an opinion that may well obviate any need for this Court to give plenary consideration to the issues. As this Court observed in Webb v. Webb, supra, this last factor is "a very substantive matter" in terms of managing this Court's workload. 451 U.S. at 501.

Pocono Green had ample opportunity to raise its procedural due process concerns below, but elected not to do so. Under these circumstances, it would be an affront to the Pennsylvania state courts, as well as a squandering of this Court's time on an issue which could well have been obviated if timely raised below and which in any event lacks a sufficiently developed record, to grant a writ of certiorari.

III. THERE ARE INDEPENDENT AND ADEQUATE STATE GROUNDS TO SUSTAIN THE DECISION BELOW.

"It is . . . a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds." Henry v. Mississippi, 379 U.S. 443, 446, rehearing denied, 380 U.S. 926 (1965). Specifically, where a petitioner fails to raise a due process claim until on appeal at the state court level, a state rule that such a failure waives the claim is an independent and adequate state law ground precluding review by this Court. Osborne v. Ohio, 110 S. Ct. 1691, 1703, rehearing denied, 110 S. Ct. 2905 (1990). Such a rule is applicable here, for Pa. R. App. P. 302(a) provides that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." The Pennsylvania Supreme

Court has repeatedly held that federal due process issues raised for the first time on appeal cannot be considered. Altman v. Ryan, 435 Pa. 401, 257 A.2d 583 (1969); Division 85, Amalgamated Transit Union v. Port Authority of Allegheny County, 417 Pa. 299, 208 A.2d 271 (1965) (procedural due process). It is small wonder that the Pennsylvania Supreme Court summarily denied Pocono Green's application for reargument.

A case bearing a remarkable procedural similarity to the circumstances here is In re Dorrance's Estate, 309 Pa. 151, 163 A. 303, cert. denied sub nom. Dorrance v. Commonwealth of Pennsylvania, 287 U.S. 660 (1932), reargument denied, 172 A. 900 (Pa.), cert. denied, 288 U.S. 617 (1933). In that case, the estate of a decedent challenged the Commonwealth's determination that the decedent had been

a Pennsylvania domiciliary for inheritance tax purposes. Like Pocono Green in the case at bar, the estate took its dispute up through the state court system, relying entirely on principles of Pennsylvania law. After an adverse decision by the Pennsylvania Supreme Court, the estate filed a petition for certiorari with this Court. In its petition, the estate advanced issues of due process. This Court denied certiorari because "the Federal question was not properly presented to, and was not passed upon by, the Supreme Court of Pennsylvania." 287 U.S. at 660. The estate then filed an application for reargument with the Pennsylvania Supreme Court. Reargument was denied because the estate's due process arguments had not been submitted to the court originally:

> The executors now urge that we pass on those questions . . .

> and reconsider the appeal on a theory not presented when the case was argued here. . . .
>
> At the time that this court decided the question of fact--in its judgment, a matter for decision according to the law of Pennsylvania--it was held, for the reasons stated in the opinion filed, that John T. Dorrance was domiciled in Pennsylvania. As no federal question was involved, or presented by the record or briefs or in the oral argument, for consideration in the decision of the basic matter of fact, none was considered or decided and none remains for decision.

172 A. at 900. The estate again petitioned for a writ of certiorari following the Pennsylvania Supreme Court's refusal to rehear the case, but again this Court denied the writ.

The Dorrance case illustrates a salient principle of Pennsylvania state law--i.e., that "sandbagging" will not be tolerated and that, in particular, an application for reargument which raises due process claims for the first time

will be denied. That is precisely what Pocono Green attempted to do here. The Pennsylvania Supreme Court's summary denial of Pocono Green's application for reargument thus simply reflects a well-established tenet of Pennsylvania state law. And, just as this Court denied the estate's second petition for certiorari in Dorrance, so likewise should it deny Pocono Green's petition in the case at bar.

IV. THE PETITION FAILS TO COMPLY WITH THE RULES OF THIS COURT.

Sup. Ct. R. 14.5 states that "[t]he failure of a petitioner to present with accuracy . . . whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition." The Board respectfully submits

that Pocono Green's petition fails to disclose to this Court a key fact that has a dispositive bearing on whether the issues merit certiorari: namely, that the due process question was not timely raised, and was never passed upon, below.

Pocono Green has thus violated Sup. Ct. R. 14.1(h), which requires that, if review of a state court judgment is sought, a petition for certiorari shall specify, inter alia, (1) the stage of the proceedings, both in the court of first instance and the appellate courts, where the federal questions sought to be reviewed were raised, and (2) the manner in which those issues were raised and passed upon by those courts. For obvious reasons, Pocono Green's petition is silent as to all the foregoing information.

Pocono Green's failure to obey Rule 14.1(h) is no mere academic procedural

nicety. As this Court cautioned in Webb v. Webb, supra, Rule 14.1(h) should be applied with "vigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below." 451 U.S. at 499.

V. POCONO GREEN'S PETITION MISSTATES THE LAW.

Echoing the criteria for certiorari suggested in Sup. Ct. R. 10.1(b), Pocono Green tries to whet this Court's interest by asserting that the holdings of lower courts are in chaotic disarray concerning the applicability of procedural due process to zoning proceedings. That assertion is untrue.

For example, Pocono Green cites South Gwinnett Venture v. Pruitt, 491 F.2d 5 (5th Cir.), cert. dismissed, 416

U.S. 901, cert. denied, 419 U.S. 837 (1974), for the proposition that "[t]he Fifth Circuit has concluded that all zoning board activity is legislative and, therefore, the Due Process Clause imposes no restrictions on the process utilized by the zoning board in considering an application under a zoning ordinance" (Petition for Certiorari at 11-12). By way of contrast, Pocono Green then cites Rogin v. Bensalem Township, 616 F.2d 680 (3d Cir. 1980), cert. denied, 450 U.S. 1029 (1981), in which the Third Circuit distinguished between administrative-type zoning proceedings, which are limited by procedural due process, and legislative-type proceedings, which are not. But the supposed contrast between these two rulings is illusory, for the Fifth Circuit, like the Third, has acknowledged that certain zoning decisions are circum-

scribed by procedural due process. See County Line Joint Venture v. City of Grand Prairie, 839 F.2d 1142, 1145 (5th Cir.), cert. denied, 109 S. Ct. 223 (1988) ("circumstances may arise in which the zoning decision of a governmental body . . . may require some procedural due process"). The Fifth Circuit in South Gwinnett simply held that the particular type of proceeding there (an application to amend the ordinance by rezoning a parcel of property) was legislative in nature.

To bolster its portrayal of confusion among the lower courts, Pocono Green cites the opinion in Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986). According to Pocono Green, the Eighth Circuit in Littlefield went awry in the following manner:

> There, the Eighth Circuit Court of Appeals stated that Proce-

> dural Due Process considerations were relevant, but analyzed the process by the wrong standard. After recognizing that the landowner was entitled to Procedural Due Process, the Eighth Circuit Court should have evaluated the procedural protections afforded. Instead, the Court of Appeals relied on Euclid v. Amber Realty, [272 U.S. 365 (1926)] and analyzed the decision of the zoning authority under the Substantive Due Process standard of arbitrariness and reasonableness.

(Petition for Certiorari at 12 (emphasis in original).) But, in its zeal to have a straw man to attack, Pocono Green has utterly mischaracterized the Littlefield opinion. The court there did not confuse procedural with substantive due process. Rather, the plaintiff had argued both forms of due process, and the opinion discusses each one separately. See 785 F.2d at 599-603 (discussing procedural due process); id. at 603-08 (discussing substantive due process). Furthermore, not only did the Eighth Circuit not rely

on Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), in its analysis of the procedural due process claims, but the Euclid decision is not mentioned even once in the opinion. The only confusion is on the part of Pocono Green.

In fact, the lower courts' holdings are quite harmonious. All courts that have considered whether procedural due process applies in zoning proceedings appear to agree that procedural due process applies where the proceedings are judicial or administrative in nature, and that it does not apply if the proceedings are legislative in nature. As Judge Posner explained in Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 468 (7th Cir. 1988), it is not the label applied to a zoning decision which determines whether the decision is legislative or adjudicative, but its function:

> A legislature is not allowed to circumvent the due process clause by the facile expedient of announcing that the state's courts and administrative agencies are henceforth to be deemed legislative bodies even though nothing in their powers and procedures has changed. But neither is the legislature required to judicialize zoning, and perhaps it would not be well advised to do so. The decision whether and what kind of land uses to permit does not have the form of a judicial decision. The potential criteria and considerations are too open-ended and ill-defined.

Accord Harris v. County of Riverside, 904 F.2d 497, 501-02 (9th Cir. 1990). Legislative decisions are broadly based. Because these decisions tend to affect a relatively large class of persons, the democratic constraints of electoral pressure afford the affected persons a measure of protection without the need for procedural due process. Administrative, adjudicative, or judicial decisions, on the other hand, affect far smaller groups

of individuals. Hence the need to insist upon procedural due process. Coniston Corp. v. Village of Hoffman Estates, supra, 844 F.2d at 469.

To be sure, a scrutiny of the case law in this area may well reveal some disagreement concerning whether particular zoning decisions should be classified as legislative or adjudicative in nature. However, that has not been raised as an issue in this case. Furthermore, if this Court were to take upon itself the task of classifying the myriad decisions that arise in land use regulation, from rezonings to variances to building permits, this Court would in short order find itself transformed into a super-zoning board.

Finally, even assuming arguendo that other lower court cases are in every bit as much disarray as Pocono Green would

have this Court believe, certiorari should nonetheless be denied. After all, what makes a state court decision "cert-worthy," so to speak, is not that other lower court decisions are in conflict, but rather that the state court decision for which review is sought has itself "decided a federal question in a way that conflicts" with those other decisions. Sup. Ct. R. 10.1(b). In the case at bar, the Pennsylvania Supreme Court did not decide any federal question at all, let alone one that conflicts with other lower court rulings.

VI. THE PETITION EXAGGERATES THE IMPORTANCE OF THE ISSUES. IN THE CONTEXT OF THE PRESENT CASE, THESE ISSUES ARE OF LITTLE SIGNIFICANCE TO ANYONE OTHER THAN POCONO GREEN.

Pocono Green suggests that procedural due process is needed to force zoning authorities to disclose the reasons for their decisions, thereby easing the evidentiary problem which this Court identified in Arlington Heights v. Metropolitan Housing Development Co., 429 U.S. 252, 266 (1977), as an impediment to establishing discriminatory motives for zoning decisions. This "sunshine" function of procedural due process is an intriguing notion, but one that has nothing whatsoever to do with the facts of the present case.

There was nothing furtive or secret about the Board's reasoning. As Pocono

Green has repeatedly emphasized (see Petition for Certiorari at 4), and as the record makes abundantly clear (App. at 46a-47a, Findings 22 and 23; App. at 49a), the Board expressly stated the reasons for its decision to reject Pocono Green's development plan. Pocono Green seeks to have this Court second-guess the Board not because the Board failed to articulate the basis for its decision, but simply because, in Pocono Green's view, the Board decided wrongly. See Petition for Certiorari at 2 ("[t]he [Board] reached an incorrect decision because it relied upon public opinion rather than competent evidence"). This case, in other words, does not implicate significant constitutional issues. It merely involves a disgruntled developer attempting, quite literally, to make a federal case of it.

The other two rationales offered by Pocono Green as an enticement to the grant of certiorari are equally bogus. The first rationale is that procedural due process promotes the effective administration of zoning ordinances (Petition for Certiorari at 16). But so what? This is hardly a consideration worthy of this Court's interest. Since when has the United States Constitution been reduced to an adjunct to local land control ordinances? This rationale does not add significance to the present case; it only serves to trivialize the Constitution.

Pocono Green's second rationale is that an effective national housing policy requires the uniform application of due process rights (Petition for Certiorari at 18). This argument, however, is simply a reprise of Pocono Green's earlier

false assertion that lower court holdings concerning procedural due process are in disarray.

CONCLUSION

"This case presents a garden-variety zoning dispute dressed up in the trappings of constitutional law." Coniston Corp. v. Village of Hoffman Estates, supra, 844 F.2d at 467. Not until the eleventh hour did Pocono Green conjure up the constitutional issues which it would now have this Court pass upon for the first time. The fact that Pocono Green overlooked these issues below is hardly surprising, for they have neither substance nor significance in the context of the facts of this case. It would be a waste of this Court's docket time, and an invitation to thousands of other aggrieved developers throughout the nation

to beseige this Court with certiorari petitions, if this Court were to grant Pocono Green's petition here. Certiorari should therefore be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Brief in Opposition to Petition for Certiorari were served upon counsel of record by posting the same in the United States mail, postage prepaid, this 14th day of December, 1990.

WILLIAM E. MCDONALD

No. _____

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1990

POCONO GREEN, INC.,

Petitioner,

vs.

BOARD OF SUPERVISORS OF KIDDER
TOWNSHIP, PENNSYLVANIA,

Respondent

APPENDIX TO
BRIEF IN OPPOSITION TO PETITION
FOR CERTIORARI

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IN THE COURT OF COMMON PLEAS
OF CARBON COUNTY,
PENNSYLVANIA

POCONO GREEN, INC.,	:	NO. 85-0805 OF 1985
Appellant	:	
v.	:	CIVIL ACTION - LAW
BOARD OF SUPERVISORS OF KIDDER, TOWNSHIP,	:	
Appellee	:	ZONING APPEAL

BRIEF ON BEHALF OF
APPELLANT, POCONO GREEN, INC.

I. HISTORY AND PROCEDURAL BACKGROUND OF THE CASE

This matter is before the Court on the developer's appeal from the action of the Board of Supervisors of Kidder Township from its refusal to grant Tentative Approval for a Planned Unit Development known as "Pocono Green." The property in question, which is part of a larger tract, a portion of which is in Kidder Township and a portion of which is

in the adjoining East Side Borough, is in a district designated "R-2" under the Kidder Township Zoning Ordinance.[1]

On March 13, 1985, Pocono Green, Inc., the developer, made application to the Kidder Township authorities for Tentative Approval for a Planned Unit Development on Tannery Road.[2]

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[1]See page 1, ¶ 2 of the Report of the Supervisors. The part of the tract in East Side Borough has been granted Tentative Approval as a Planned Unit Development which approval is not now subject to appeal. Physically this is one tract and one development through which the boundary line runs separating Kidder Township from East Side Borough.

[2]The Report of the Supervisors states that this is a request for a "Preliminary approval of a Planned Unit Development." This terminology is in error under Article VII of the Pennsylvania Munici-palities Planning Code which governs planned unit developments. The proper term is "Tentative Approval". That term is important because it gives rise to very specific different rights than a conventional "preliminary" subdivision approval under conventional zoning.

Pursuant to the application and notice on the application for a Tentative Approval, the plan was reviewed and recommended for Tentative Approval, with conditions, by the Kidder Township Planning Commission. It was also reviewed by the Carbon County Planning Commission and, with certain comments, recommended for approval.

Pursuant to appropriate public notice a public hearing was held before the Board of Supervisors of Kidder Township at the Municipal Building in Lake Harmony on April 29, 1985. At that time the Applicant (Appellant herein) appeared represented by counsel, together with its expert witnesses, and various members of the public also appeared. Applicant's counsel conducted the hearing in its behalf eliciting testimony from the witnesses and various exhibits were intro-

duced into evidence. The testimony was taken stenographically and transcribed. On June 17, 1985, the Board of Supervisors issued a written decision entitled "Report of the Supervisors Pursuant to Pennsylvania Municipalities Planning Code in the Township Zoning, Subdivision and Land Use Ordinances and the Township Comprehensive Plan" which denied the application for Tentative Approval for only one stated reason.

A timely appeal was filed to this Court in accordance with the Pennsylvania Municipalities Planning Code and the required notices of such appeal served.

It is the Appellant's position that the decision of the Board of Supervisors should be reversed and the Board be ordered to issue the Tentative Approval as requested on the grounds that

the Supervisors committed an abuse of discretion or an error of law or both.

II. ARGUMENT

A. THE SCOPE OF REVIEW OF THE COURT COURT [sic] OF COMMON PLEAS

The scope of review of the Court of Common Pleas, where no additional evidence is taken by it de novo, is to determine whether the Board of Supervisors abused their discretion or committed an error of law. Our appellate courts have defined this on a number of occasions but nowhere more cogently than in Doran Investments v. Muhlenberg Township, et al., 10 Pa. Cmwlth. 143, 309 A.2d 450, 453 (1973), where Judge Rogers writing for that Court en banc declared:

> "[1] The court below correctly determined that, not having taken additional testimony, its duty was to determine whether the board of commissioners abused their discre-

> tion or committed an error of law. Brauns v. Swarthmore Borough, 4 Pa. Cmwlth. 627, 288 A.2d 830 (1972); DeFeo v. Brookhaven Borough, 3 Pa. Cmwlth. 377, 283 A.2d 505 (1971). Ours is the same duty.
>
> Doran contends that its plan complies with all of the requirements of Ordinance No. 106 and that it is entitled to have its plan tentatively approved."

Appellant submits that in the case at bar the Board of Supervisors committed both an abuse of discretion and a positive error of law and consequently their action in denying the Tentative Approval should be reversed and an Order entered directing them to issue that Tentative Approval.

B. THE RIGHT TO OBTAIN A TENTATIVE APPROVAL FOR A PLANNED UNIT DEVELOPMENT IS DETERMINED BY THE CRITERIA SET FORTH IN THE PARTICULAR ORDINANCE PROVIDED THAT THE ORDINANCE IS CONSISTENT WITH THE ENABLING LEGISLATION.

The law in this Commonwealth is very clear with respect to the standards by which a Planned Unit Development is to be judged. The specific standards must be set forth in the ordinance and the ordinance must comply with the enabling legislation. Once an applicant demonstrates compliance with the applicable criteria (provided they are consistent with the enabling legislation) the applicant is entitled to obtain Tentative Approval. The reason for this is rooted in the evolution of zoning law in this Commonwealth and is clearly set forth in footnote 1 appearing in Doran Investments v. Muhlenberg Township, supra, where our Commonwealth Court declared:

> . . . . "The practice of case by case consideration condemned in Eves [v. Zoning Board of Adjustment, 401 Pa. 211, 164 A.2d 7 (1960)] is overcome by the requirement that detailed development standards appear in the planned residential development ordinance and by assuming that compliance with those standards would lead to approval, subject to the additional feature, not usually present in conventional zoning, that the local planners may attach conditions conducive to the public interest. If Article VII of the MPC were to be construed to mean that a plan adhering to the standards of the ordinance may be disapproved by the governing body whenever it concludes for any reason that the plan is not in the public interest, the legislation would be identical to that struck down in Eves. Where a choice is present, courts will adopt a construction which will render legislation constitutional, not one which raises constitutional questions."

As Doran points out the question is whether or not the plans and other materials meet the applicable criteria. Those criteria must be objective

and, as will be pointed out infra, if those criteria can be met by the imposition of conditions, then it is appropriate to impose conditions and not refuse the entire Tentative Approval. Both the Supreme Court and Commonwealth Court in various cases which followed the landmark case of Village Two at New Hope, Inc. Appeals, 429 Pa. 629, 241 A.2d 81 (1968), stated that the Planned Unit Developmen [sic] is the preferred method of development.

In this case the Board of Supervisors misapplied the law and imposed an improper legal standard upon the Applicant which led directly to an improper result. It is submitted that this is reversible error. The principal ground for the refusal to grant the Tentative Approval in this case is the conclusion of law which reads as follows:

> "The evidence before the Board of Supervisors is sufficiently deficient in showing of the feasibility of the proposed sanitary waste disposal system, being a stream discharge sewage treatment plan. A proposed system which discharges into a stream which often runs dry and leads into a pond with no discharge point is detrimental to the environment, the immediate residents of the area, and all residents of Kidder Township in general."

(See pages 13-14 of the Report of the Supervisors Pursuant to Pennsylvania Municipalities Planning Code in the Township Zoning, Subdivision and Land Use Ordinances and the Township Comprehensive Plan, which is the decision from which this appeal is taken.)

The record discloses no support for this statement. The Applicant's witness, Mr. John Burke, a registered professional engineer of twenty-two years of experience, testified that he had drawn the plans and was responsible for doing

the feasibility study for this development. (N.T. 41, 45-48, 59). He further testified that providing the central sewage necessary for this development was not only feasible, in his opinion, but had been the subject of review by the Department of Environmental Resources of the Commonwealth of Pennsylvania and found by them to be feasible. Exhibit "6" in the record is a copy of a letter from the Department of Environmental Resources, Bureau of Water Quality Management dated April 1, 1985, directed to Mr. E. Kent Clark of the Kidder Township Planning Commission unequivocally stating that the preliminary plans for the distribution of sewage collection and treatment and disposal were acceptable to the Department. In pertinent part that letter reads as follows:

> "This Department has reviewed the preliminary plans

> for Pocono Green Development, located in Kidder Township and East Side Borough, Carbon County PA. The proposal submitted utilizing private water supply and distribution and for sewage collection, treatment and disposal is acceptable to the Department of Environmental Resources."

Our Commonwealth Court explored the same issue as presented by the case at bar on a prior occasion and came to precisely the opposite conclusion as that to which the Board of Supervisors came in this case and so decided the issue as a matter of law. In In Re Appeal of Molnar, 64 Pa. Cmwlth. 518, 441 A.2d 487, 490, 491 (1982), the Court held that the Borough Council's denial of a Tentative Approval on the basis that it did not accept the applicant's architect and hydraulic engineer's testimony as to the adequacy of proposal for storm water sewers and drainage was improper. While the opinion of the Court does not so re-

flect, one of the considerations in that case was the uninformed opinion of some lay protestants. The Court made clear that there was no evidence to contradict this assertion by the applicant as to adequacy and further that only the FEASIBILITY of the proposal only [sic] was at issue at this stage in the proceeding. The Court there said:

> "The Borough Council objected finally to the alleged insufficiency of the developer's plans for abatement or containment of the presently existing serious storm water drainage problem at the site, arguing that this situation would be severely exacerbated by the proposed development. The developer proposed to deal with the problem by means of a twenty-five year interval storm drainage basin or pond coupled with a rerouting of the stream which runs through the area. The dimension of the basin represented an increase in size from that set forth in the original plan. The architect, basing his opinion upon the studies and earlier testimony of Dr. John Verna, a hydraulic engineer, testified to the ade-

quacy of the proposal. Several weeks prior to the hearing, the proposal and studies done by Dr. Verna had been made available to the Borough's planner and engineer but neither was called to testify or responded at the hearing. There is, therefore, nothing in the record to support the Borough Councils' finding of the inadequacy of the storm drainage plan. However, as noted by the Borough Council, the area downstream from the site is subject to flooding and an increase or ill-chosen alteration in flow of the stream would seriously affect downstream properties. Although the Borough cannot burden the developer with responsibility for alleviation of an existing problem, Michaels, it can require the developer to adopt appropriate storm control measures to protect the community against further aggravation of the problem as a result of construction of the PURD. At this stage of the proceedings, however, the developer is required only to disclose the feasibility of proposals for the disposition of storm water, Section 707(4)(v) of the MPC, 53 P.S. §10707(4)(v); specifications as to the precise projected relocation of the stream are to be included in his application for final approval. Section 711(a) of the MPC, 53 P.S. §10711(a). (Emphasis sup-

plied.)

In the prior Molnar case captioned Municipality of Bethel Park Appeal, 51 Pa. Cmwlth. 128, 414 A.2d 401 (1980), the Court indicated that where doubt existed as to whether or not a particular criteria could be complied with, it was necessary to consider whether or not a conditional approval was not more appropriate than an outright refusal. The Court did this by including virtually its entire order in the prior Molnar case in its opinion in the second case. Thus, in this situation we come face to face with the proposition that the Board of Supervisors here not only erred, but could have perhaps cured their error by granting a Tentative Approval and conditioning the same upon compliance with the applicable Department of Environmental [sic] standards. They chose not to

do that, again we suspect, inter alia, because it is a political body and chose to satisfy its voting constituents.

The holding in Molnar, supra, is in no way diminished or limited by Rees v. Board of Supervisors of Indiana Township, ___ Pa. ___, 513 A.2d 584 (1986). In that case the opinion was directed to the approval of a stipulation which had been entered into between an Applicant-Developer and the Township as to a proposed planned residential development approval. There had been a series of findings by the Board of Supervisors of Indiana Township refusing a Tentative Approval almost all of which the court inferentially found totally without merit. One finding dealt with the adequacy of flow of a creek into which the sanitary sewer outfall was to run. The Municipality found that it was

"not acceptable" because of that. The Court there did not rule upon the question of whether or not such a refusal was, in fact, valid but rather held that it was the only issue in the case that could be the subject of review. A reading of the Record in that case clearly shows that the Court never reached the issue, but merely decided that since that objection was no longer part of the case (of the numerous ones made) there was no need to even reach the issue.

In Rees, supra, the matter was settled by interim negotiations between the Township and the applicant. The intervenor objected to the stipulation and it was that objection which the Court dismissed. In Rees the Court said that all of the other objections to the PRD (that the local sewer authority objected, that it was not in harmony with the com-

prehensive plan, that it would create traffic problems at the particular intersection, that it violated other zoning provisions not applicable to PRDs, that the interior road network was not adequate or safe) were invalid as objections. The Record and the paper books show that the Court never reached the question as to whether, under the facts in Rees, the sewage question was properly decided. Somewhat inartfully, perhaps, the Court there was saying that it was the only objection to be reviewed by the Court, but it was not necessary to do the same because of the settlement. Additionally there the Applicant-Developer had access to public sewers and for some reason was originally unwilling to hook into them. (See Rees Record, p.260a.)

The Kidder Township Planned Unit Development Ordinance itself con-

tains no criteria with respect to sewage except that any residential development must be "attached to a centralized water supply system and a centralized sewage disposal system." There being no specific criteria in the Ordinance against which such "feasibility" must be measured, the standards then applicable are those that are imposed by the Commonwealth of Pennsylvania, Department of Environmental Resources, which is the governmental authority charged with the duty of regulating permits, overseeing construction, operation and maintenance of such facilities.[3] In this case, the

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[3]There is no question about the Commonwealth's paramount interest in control-ling sewage plants and discharge points. All plans must be approved by the Department of Environmental Resources, but to operate without a permit subjects the operator to the exposure of significant penalties. The Act of October 10, 1980, P.L. 894, No. 157, §1, 35 P.S. 691.207 (pocket parts) states:

Department having made an uncontradicted and unrebutted statement as to the feasi-

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> "§691.207. Approval of plans, designs, and relevant data by the department
>
> All plans, designs, and relevant data for the construction of any new sewer system, or for the extension of any existing sewer system, by a municipality, or for the erection, construction, and location of any treatment works or intercepting sewers by a person or municipality, shall be submitted to the department for its approval before the same are constructed or erected or acquired. Any such construction or erection which has not been approved by the department by written permit, or any treatment works not operated or maintained in accordance with the rules and regulations of the department, is hereby also declared to be a nuisance and abatable as herein provided.

Section 202 of the same Act (35 P.S. 691.202) subjects all sewage disposal into the waters of the Commonwealth to the continuing jurisdiction of the Department of Environmental Resources. Absent other objective criteria, these (and these alone) govern this and all other applications.

bility of the proposal for both water distribution and sewage collection, that determination of the Department should control. In addition, however, there was the testimony of Mr. John Burke, a registered professional engineer, who did the preliminary design which was submitted to the Department of Environmental Resources, who testified that in his opinion, the system was feasible. There was no evidence whatsoever that this was not the fact.

The Board of Supervisors, however, misconstrued two lay people who were in the audience (and whom one could perhaps characterize as opponents) who testified that there was an insufficient amount of water in the stream into which the sewage disposal plant would be discharging the treated effluent. Testimony was given to a Mr. Les Herling and it

appears at pages, N.T. 64-65.[4] The second witness was a Mr. Richard Beam, who brought forward a Mr. Brady who lived approximately a mile downstream from the point at which this effluent would enter the stream and who also was concerned that the stream might periodically go dry. They were not experts and were not even qualified observers. Mr. Brady was also concerned that the children who skate on the ice on the pond at his property (approximately a mile away) might eat some of the ice which he feared might be contaminated. (See N.T. 68-71). Needless to say that it is the responsibility of the Department of Environmental Resources to see to it that

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[4]Not to be confused with the next witness Mr. Chris Herling who was more concerned with whether the developer had any plans to make a donation to the volunteer fire company of Kidder Township of which he was a part.

the sewage disposal plant is designed and built to be safe. It is regularly inspected and tested by them to prevent any malfunction. However, Mr. Beam and Mr. Brady's "petition" with seventy-nine names on it obviously weighed more with the Board of Supervisors than the facts and law.[5]

The Report of the Board of Supervisors on its face indicates that this is the only basis on which the Board of Supervisors refused the tentative application. On closer reading, however, it is possible that there are certain other matters which went into their deliberations and may have influenced the decision to deny the Tentative Approval. Whether or not these are make-weights or not is impossible to determine from their Report. Having addressed what appears to

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[5]See N.T. 68 and Township Exhibit 1.

be the overriding reason and, it is submitted, having amply demonstrated that the Supervisors improperly denied the application for Tentative Approval for the stated reason, the Appellant developer will show that the other factors are equally without merit.

C. THE PENNSYLVANIA MUNICIPALITIES PLANNING CODE REQUIRES THAT THE ORDINANCE SET FORTH ALL STANDARDS, CONDITIONS AND REGULATIONS UNDER WHICH THE APPLICATION FOR A PUD IS TO BE JUDGED.

The legislature in writing the PUD provisions of the Code was mindful of the Supreme Court's opinion in Eves v. Zoning Board of Adjustment, 401 Pa. 211, 164 A.2d 7 (1960), which had disapproved "flexible" "selective" zoning. The import of that decision was that, in order to remain constitutional, zoning ordinances were required to have pre-announced, objective criteria so that the

owners of land would know what was, and was not, permitted. This found expression in the requirement in §705 (53 P.S. 10705) which states:

> "Section 705. Standards and Conditions for Planned Residential Development. -- Every ordinance adopted pursuant to the provisions of this article shall set forth all the standards, conditions and regulations by which a proposed planned residential development shall be evaluated, and said standards, conditions and regulations shall be consistent with the following provisions:
>
> (a) The ordinance adopted pursuant to this article shall set forth the uses permitted in a planned residential development, which uses may include and shall be limited to:
>
> (1) Dwelling units in detached, semi-detached, attached or multi-storied structures, or any combination thereof; and
>
> (2) those nonresidential uses deemed to be appropriate for incorporation in the design of the planned residential development. The ordinance may establish regulations setting forth the timing of

development among the various types of dwellings and may specify whether some or all nonresidential uses are to be built before, after or at the same time as the residential uses.

(b) The ordinance adopted pursuant to this article shall establish standards governing the density, or intensity of land use, in a planned residential development. The standards may vary the density or intensity of land use, otherwise applicable to the land under the provisions of a zoning ordinance of the municipality within the planned residential development in consideration of:

(1) The amount, location and proposed use of common open space;

(2) The location, and physical characteristics of the site of the proposed planned residential development; and

(3) The location, design, type and use of structures proposed."

Where the Ordinance does not supply such "standards, conditions and regulations" it can only be taken to mean

that there are none or that those under other governmental jurisdiction apply.

In the case at bar, the Ordinance does not set forth standards, conditions or regulations for water supply, sewage disposal, storm water, soil erosion control or the financial viability of the private companies which operate the water and sanitary sewage companies. This is altogether appropriate because the Commonwealth has pre-emptive, all embracing regulatory mechanisms for the licensure, planning, construction and operation of sewer plants as discussed infra. It has similar controls for water (25 Pa. Code 109.1, et seq.) and for soil erosion control (25 Pa. Code §102.2). Rates and economics are governed by the Public Utility Commission. No other body or party has jurisdiction of such matters.

The feasibility of water and sanitary sewer supply to the proposed development was amply demonstrated by the engineering testimony and the Department of Environmental Resources letter in the Record. Erosion control mechanisms such as plans and permits are done when FINAL APPROVALS are sought for construction, not at the time of TENTATIVE APPROVAL. Before any building permits can be issued, an application must be made to the Department, plans must be submitted and approved. The relevant portion of the Pennsylvania Code (25 Pa. Code 102.42 and 102.43) are:

> "§102.42. Notification of application for building permits.
>
> Any local governing body which issues building permits shall notify the Department or its designee immediately upon receipt of an application for a building permit involving an earth-moving activity which

affects five acres or more of land."

"§102.43. Withholding building permits.

A local governing body shall not issue a building permit to those engaged in earthmoving activities requiring a Department permit until the Department has issued the permit pursuant to §§102.41 -- 102.42 of this title (relating to responsibilities of local governing bodies)."

Clearly these cannot legally be grounds for refusal, if indeed they are, since the only applicable "standards, conditions and regulations" have been met or will be met when the appropriate time comes.

D. IN THIS CASE THE BOARD OF SUPERVISORS COMMITTED REVERSIBLE ERROR WHEN THEY APPLIED STANDARDS NOT MANDATED BY THE ENABLING LEGISLATION AND THEIR OWN ORDINANCE.

The Pennsylvania Municipalities Planning Code (Pa.MPC) 53 PCA 10101 et

seq. is the governing framework for all zoning, subdivision and planning within the Commonwealth of Pennsylvania. This enabling legislation does exactly what the term "enabling" means. It enables political subdivisions in the Commonwealth to enact zoning, subdivision and planning ordinances, IF, AND ONLY IF, THEY COMPLY WITH BOTH THE SUBSTANTIVE AND PROCEDURAL SAFEGUARDS SET FORTH IN THE CODE. For example, in Abel v. Middletown Township, 7 Pa. Cmwlth. 6, 297 A.2d 525 (1972), the Township of Middletown attempted to impose by ordinance an additional procedural step which was not expressly provided for in the Pa.MPC. In that case the Township of Middletown required a "sketch" plan to be submitted prior to a request for a Tentative Approval for a planned residential development or a planned unit residential devel-

opment. Our Commonwealth Court held that the municipality was not at liberty to change the procedural steps set forth in the Code. It is not obligatory that every municipality have a planned unit development or planned unit residential development district or that it make provision for that kind of development, Kauffman and Broad, Inc. v. Board of Supervisors of West Whiteland Township, 20 Pa. Cmwlth. 116, 340 A.2d 909, 376 A.2d 305 (1975). If, however, it elects to avail itself of those provisions, then it must comply with the standards set forth in the enabling act, Abel, supra.

The Municipalities Planning Code sets forth quite particularly the kind of information which the applicant developer must submit and it limits what the Ordinance may require. The relevant provisions are contained in §707 and read

as follows:

> "Section 707. Application for Tentative Approval of Planned Residential Development. --In order to provide an expeditious method for processing a development plan for a planned residential development under the terms of an ordinance adopted pursuant to the powers granted herein, and to avoid the delay and uncertainty which would arise if it were necessary to secure approval, by a municipality of local procedures, of a plat of subdivision as well as approval of a change in the zoning regulations otherwise applicable to the property, it is hereby declared to be in the public interest that all procedures with respect to the approval or disapproval of a development plan for a planned residential development and the continuing administration thereof shall be consistent with the following provisions:
>
> * * *
>
> (4) <u>The ordinance shall require only</u> such information in the application as is reasonably necessary to disclose to the governing body or its designated agency: (i) the location, size and topography of the site and the nature of the landowner's interest in the

land proposed to be developed; (ii) the density of land use to be allocated to parts of the site to be developed; (iii) the location and size of the common open space and the form of organization proposed to own and maintained [sic] the common open space; (iv) the use and the approximate height, bulk and location of buildings and other structures; (v) the feasibility of proposals for the disposition of sanitary waste and storm water; (vi) the substance of covenants, grants of easements or other restrictions proposed to be imposed upon the use of the land, buildings and structures including proposed easements or grants for public utilities; (vii) the provisions for parking of vehicles and the location and width of proposed streets and public ways; (viii) the required modifications in the municipal land use regulations otherwise applicable to the subject property; (viii.1) the feasibility of proposals for energy conservation and the effective utilization of renewable energy sources; and (ix) in the case of development plans which call for development over a period of years, a schedule showing the proposed times within which applications for final approval of all sections of the planned residential development are intended

> to be filed and this schedule must be updated annually, on the anniversary of its approval, until the development is completed and accepted; (As amended 1982 P.L. 613, No. 173.)" (Emphasis supplied)

In its reports the Supervisors admitted that all of the requirements of §707 were met except for three. Paragraph 4 of the Findings of Fact at pages 3 and 4 list in detail all of the material required by the Pennsylvania Municipalities Planning Code and admit that the application contained all of the information required. In paragraph 5 of the Findings the Board of Supervisors mentioned three which, they assert, were required by the Municipalities Planning Code but which were not included. These were:

(a) the height of the buildings proposed,[6]

(b) feasibility proposals for energy conservation and effective utilization of renewable energy sources, and

(c) the required modification of municipal land use regulations.

Appellant vigorously disputes all of these.

The plans and sketches submitted to the Board of Supervisors in the

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[6]The Findings of Fact are clearly contradictory because in Finding of Fact number 19, the Board of Supervisors found that all height requirements of the zoning ordinance will be met. Finding of Fact number 19 (at page 9) reads as follows:

> "19. The developer has shown clustered housing and all height requirements of the zoning ordinance will be met. There appears adequate light and air in proper building spacing."

application clearly shows [sic] the height of the buildings as being within the permissible limits. In addition, Finding of Fact number 19 (p.9) admits that the height limitation has been met.

As to the feasibility proposals for energy conservation and effective utilization of renewable energy resources, since the enactment of the Ordinance the Pa.MPC there has been legislation mandating energy conservation measures.[7]

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[7]By Federal regulation, the developer is required to disclose to any buyer in the sales agreement the R valve, type and the thickness of insulation installed in each part of the house. 16 CFR Ch. 1 §460.16 (1-1-86 Ed.). Further, this development is served by Pennsylvania Power and Light (PP&L) which is one of the companies in the Federal Residential Energy Conservation Program providing for energy audits and means of conservation for the Residential Conservation [of Energy] Service. See 10 CFR Ch. 11 §456 et seq. and particularly Subpart E, §456.501 et seq. PPL has an outstanding record in this regard.

As to the required modification of municipal land use regulations, the Board of Supervisors admitted in its Finding of Fact number 5 that evidence of this was produced at the public hearing.

The fact that there were departures from the conventional Township zoning ordinances has no bearing on the approval of a Planned Unit Development or a Planned Residential Development. It cannot be the basis for a refusal. This was the subject of a significant comment by our Commonwealth Court in Michaels Development Company, Inc. v. Benzinger Township Board of Supervisors, 50 Pa. Cmwlth. 281, 413 A.2d 743, 747 (1980), where that Court held that it is the very essence of a Planned Unit Development that it depart from conventional lot-by-lot standards. It there said:

> "Departures from the township zoning ordinance have no

> significant bearing on the approval of the PRD application. A PRD application is not to be judged by the standards of the township zoning ordinance, for "[i]t is the very essence of a planned residential development that it may diverge from zoning requirements." Doran, supra, 10 Pa.Cmwlth. at 155, 309 A.2d at 457. Instead, a PRD must meet the requirements of the particular Ordinance. Here, all have agreed that the Developer has so complied."

Therefore this statement, if it was part of the basis of the refusal is without merit.

In its Finding of Fact number 11A the Supervisors misconstrued their own zoning Ordinance. That Finding reads as follows:

> "11. The Plan documents depart from the Kidder Township Subdivision and Land Development Ordinance (1971) and the Kidder Township Zoning Ordinance provisions (other than Article 4, Subsection 4.403 Use Class 14 - Planned Unit Development) as follows:
>
> A. The rear set back requirement of thirty (30')

> feet as [sic] not been met. The Plan must show sufficient rear set back from the property lines as to not adversely effect [sic] adjacent property owners. This requirement would be a condition of any tentative preliminary plan approval;"

The Supervisors were apparently under the impression that they could incorporate by reference the rear setback requirement of the conventional zoning ordinance which would require rear yards of a minimum of thirty feet. No such requirement appears in their Planned Unit Development ordinance. Under Michaels, supra, the conventional zoning ordinance is not relevant to the Planned Unit Development type of ordinance unless it is specifically set forth as a standard as required by §705 of the Pennsylvania Municipalities Planning Code. We have searched the entire Ordinance and have been unable to find any rear yard requirement for a PUD development. If the refusal is, in part,

bottomed on this premise it is also fatally defective as a matter of law.

The Supervisors found that the plan provided adequately for pedestrian and vehicular safety except for a portion of the entrance to the development. There the Supervisors criticized the plan on two grounds. The first was the adequacy of ingress and egress in Finding 11C which states:

> "C. The Plan depicting a main cul-de-sac roadway violates the provisions for cul-de-sac streets under the Kidder Township Subdivision and Land Development Ordinance. We find this to create a serious problem for ingress and egress to the within development in the event it is blocked at any given point. In the instance of fire or other emergency, this situation could create a serious danger to life and property and thus would not be in the public interest. Any plan to be given tentative approval would have to provide an alternative roadway system for vehicular traffic other than the main roadway ending in a cul-de-sac as shown on the

present Plan."

The Supervisors [sic] comments in paragraph 11C relates [sic] to ingress and egress and their finding that the road system created a "serious problem." They go on to equate this to a danger to life and property because there is no "alternate roadway." While this has a certain amount of surface appeal, the problem with this Finding is that it is JUST NOT A FACT. The Supervisors here either did not understand the testimony and the drawings or they were looking for a reason to deny the application.

This parcel of ground is irregular. It is almost bisected by the line between East Side Borough and Kidder Township. The East Side Borough portion which as been granted a PUD tentative approval pursuant to East Side's Ordinance shows the means of ingress and

egress through Kidder Township. It is obvious that because of the various constraints, a Planned Unit Development of the site is the most rational approach since a conventional "cookie cutter" kind of subdivision would obviously destroy much of the attractiveness of the tract."[8] A conventional approach would compel the destruction of almost all of the trees on the site.

No responsible developer today would attempt to foist off a plan that was unsafe or presented a danger to life or property, and that was not done here. The consulting engineer came up with an extremely ingenious and practical way of meeting the problem of a long, narrow

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[8]This was assumed by the Township's planning consultant as can be deduced from her letter of April 26, 1985 which is part of the Record as Exhibit 7. She found it "consistent with the comprehensive plan" of 1968.

tract by creating <u>two</u> (not one as the Board wanted to--and did--find) all-weather paved means of ingress and egress in the event of any emergency.[9] Mr.

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[9]There are actually three means of ingress and egress in the event of an emergency, two are paved and one is not. This problem arose in the East Side Borough application for Tentative Approval and was reviewed by the Carbon County Planning Commission for them and found to be quite acceptable. Under date of September 17, 1985 Mr. Bruce Conrad said in a letter to East Side Borough:

<u>NEW CONDITIONS</u>

> It was the opinion of this Commission that the boulevard entrance way, with the secondary loop system, would provide adequate secondary access within this subdivision for emergency purposes. If the Kidder Township portion is not going to be developed at this time, some sort of secondary emergency access way must be developed from the end of the boulevard entrance way to the beginning of the secondary loop system in East Side Borough. The Subdivider has indicated a willingness to do so. This would not have to be a paved surface since the probability of its ever being used is extremely

James S. Carr, a registered architect in twenty-two states, a partner in a major architectural and planning firm with some fifteen years of experience, who was responsible for the design, so testified.[10] Mr. John A. Burke, the consulting engineer, also testified about the dual system. By making a boulevard of the entrance, dividing the entrance by a raised, curbed, green-planted medial strip, two roads are created. Each lane is 11' wide with a 9' stabilized shoulder, a total of 20 feet. The medial is 10' wide. Normally the lanes would be one way. If one lane was blocked and the shoulder could not be used, however, the

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small."

This letter is not of Record in this case, but is part of the East Side Borough Record.

[10]See N.T. 25-26 for his credentials and authority; N.T. 32 as to the dual system and an explanation on p.36-37.

alternate would be to use the other lane on the other side of the boulevard or the other shoulder.[11] This was designed so that there could be no "choke point" at the entrance without paved alternatives as well as the shoulders.

Once beyond the boulevard, resort must be had to the plan (Applicant's Exhibit 8) to understand how simple and effective the system is in reality and how it solves the problem. The planned road system provides both normal and alternate emergency ingress and egress to and from every dwelling in the PUD by two (2) separate routes. The main thoroughfare through the development is a 22-foot wide paved, limited-access roadway, with a 9-foot shoulder on each side, for a total improved width of forty (40) feet. This thoroughfare is the primary traffic

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[11]See N.T. 43; 56-57.

route, providing efficient and uninterrupted access to all parts of the development. In addition to the main thoroughfare, the plan provides for a series of loop roads through the parking areas which serve the dwelling clusters. All of the loop roadways are located so that any obstruction in either the main thoroughfare or any of the loops (such as a stalled vehicle) can be bypassed by swinging through a well defined bypass, through and out the other side. Attached hereto as Appendix "A" and incorporated herein is a copy of the April 18, 1985 Plan (Applicant's Exhibit 9), which illustrates the flow of the primary and secondary road systems. (The markings have been superinposed [sic] on the Exhibit for ease of exposition.) The entire development is served by these two parallel all-weather paved routes which

the plans amply demonstrated and the testimony reinforced. Thus, at least two means of ingress and egress which are all-weather are provided. Any finding to the contrary just is not supported by the Record.

As part of the Carbon County Planning Commission's review of the proposed Pocono Green PUD, its Director, Bruce Conrad, and Deputy Director, Eugene Butler, made an on-site inspection of the subject tract for the purpose of determining whether the tract and the planned PUD provided safe and adequate access. Their findings are set forth in a report which was submitted to Kidder Township and the Township Planning Commission as part of their sketch plan review. That report was not contained in the record certified to the Court by the Township in this matter, but is part of the files of

the Carbon County Planning Commission, Kidder Township and the Kidder Township Planning Commission regarding the proposed Pocono Green PUD. A true and correct copy of that official communication is attached hereto as Appendix "B" and incorporated herein. That report, at pages 3 and 4 thereof, states as follows:

> "It was the primary intention of this site inspection to determine if the proposed access could be reasonably expected to be able to be kept open in an unforeseen emergency. And, if not, if there could be ad hoc emergency access from another direction if it were closed for any reason.
>
> "We concluded, from our on-site inspection, that the secondary circulation system proposed within the Subdivision would be adequate to keep access open in the event that the throughroad would be blocked for any reason. Therefore, any potential severance of access could only occur in the approximate 400 linear foot entrance road across the Pocono Hershey Golf Course. This area is not steeply sloping, does not contain any water courses

> and is immediately adjacent to a Pennsylvania Department of Transportation storage depot. It is highly unlikely that this road would ever be severed except by possible drifting snow about which seasonal precautions could be taken.
>
> We also noted that both in the area of the access road and in the area at the end of the cul-de-sac, there were cartroads on the Pocono Hershey Golf Course over which an ambulance could travel in an extreme emergency. It is clear, however, that this same alternate would not work for fire trucks. It was also clear from conversations we had with management at Pocono Hershey that, in the once in a hundred year possibility of the Subdivision's main road being blocked, they would not block such access in a true emergency."

The Board of Supervisors commented about what they misperceived as a problem and "threw it into the pot," so to speak. It is submitted that it has no place in their consideration. The proposed roadway separates two portions of the Pocono Hershey Resort Golf Course and

its patrons shortcut (trespass) over this area driving golf carts across what is proposed to be the main roadway. The problem with the Supervisors [sic] finding on this subject is that the Township apparently seeks to impose upon the Applicant here the duty of preventing a hazard which is caused by the trespassing of others. The Applicant established early on in the proceedings its right to fee title to the premises. That was part of its burden under §107(12) of the Pa.MPC. This it accomplished by both testimony and exhibits which the Board admits. In Finding of Fact number 2 it concedes that Pocono Green, Inc. was the equitable owner of all the land shown on the development plan and the landowner as defined by the Code. Nowhere on this record was any adverse interest established despite the fact that a repre-

sentative of Pocono Hershey Resort Golf Course (guests and business visitors of theirs being the offending parties) was at the hearing and testified. (See Finding of Fact 9A.) The landowner should not suffer having his plan for development refused because of the action of others who trespass upon his land now. While the Supervisors may wish to have some assurance that protective measures will be taken to prevent accidents, they cannot refuse to permit development on grounds that others (who have no interest in the land) are playing fast and loose with the developer's property. Even if this was a conventional development of a standard subdivision, the rights to create an entry road and subdivide the parcel could not be refused on grounds that trespassers might be injured if the development was permitted.

To the same extent the gratuitous comment in Finding of Fact number 16 that the recreation area is far removed from Kidder Township and the inference that the Supervisors would require compliance with the open space and density requirements would be necessary before Tentative Approval was granted is in error.[12] The Supervisors own Finding

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[12]The two findings are:

> "12. The Kidder Township Zoning Ordinance, as amended, Article 4, Basic District Regulations: Section 4.300 Use Classes and Zoning Districts, Use Class 14 Planned Unit Development would apply in the present case. The P.U.D. meets the requirements of maximum land coverage by building of 20%, being 11.7% in this P.U.D. and land coverage by all development of 30%, being 27.4% in this P.U.D. The public recreation area requirement is three hundred (300) square feet per house unit and the development meets this requirement by providing three hundred fifty nine (359) square feet per dwelling unit."

number 12 admits that all of the open space and density requirements have been met.

The Supervisors also took exception to what they infer is the inadequacy of storm drainage plans and storm

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"16. The purpose of common open space is to provide for separation of various clusters of houses, visual enjoyment, separation for circulation of air and light, a sense of privacy and to preserve as much of the natural terrain and tree growth as possible. The common open space also serves the purpose as a site for certain active recreational uses. We find that the recreational area located in Kidder Township but not adjacent to the development to be minimumly adequate to meet the recreational and common open space needs of development located in Kidder Township. The "Recreation Area C" as shown on the preliminary plan is far removed from Kidder Township. The common open space requirement of twenty-five (25%) percent for each residential district (common open space as defined by the Zoning Ordinance) has been met in Kidder Township."

water erosion noting that complete erosion and sediment control plans would be required as a condition of any Tentative Approval. They noted that there was no certification by the Applicant's engineer that the surface and subsurface conditions would not cause damage to property or life and, while not expressly so stating, inferred that this was a reason for disapproval. The problem with those Findings are [sic] no such certifications are required. The only thing that is required is that the developer demonstrate the "feasibility of proposals for the disposition of storm water" under §707(4)(v) of the Pennsylvania Municipalities Planning Code. The uncontradicted and unrebutted testimony of Mr. Burke, the engineer, established that the storm drainage plans and the erosion and sedimentation controls would not cause any

danger and are feasible (N.T. 44, 45).

Finally, soil erosion and storm sewers are gone into in great detail at the time when FINAL APPROVAL IS SOUGHT, NOT AT THE TENTATIVE STAGE. The plans for handling storm sewage were submitted at the time of the original application. The Kidder Township Planning Commission had an opportunity to review them, as did the Carbon County Planning Commission. Presumably the Township engineer had an opportunity to review them. No question was raised as to the feasibility of those proposals. No document was submitted which in any way indicates that the proposals are not feasible. No witness questioned the feasibility of the proposal for storm water. There is no requirement for soil and erosion control plans in either the Kidder Township Planned Unit Development Ordinance nor [sic]

in the Pennsylvania Municipalities Planning Code. There are overriding soil and erosion controls enforced by the Department of Environmental Resources which must be met and which are generally covered by an application process to that Department and supervision by them which obviously the developer will have to comply with at that time.[13] They are not, however, relevant or material at the Tentative Approval stage of the proceeding.

The Board of Supervisors also erred in Finding of Fact number 20 which states that the plan showed a general commercial area and the developer Applicant failed to advise the Township of the specific uses that would be made of that area. The Developer is not required

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[13]See §711 of the Pa.MPC, 53 P.S. 10711 for the second step of the two-step procedure required by the Enabling Act.

to state what specific uses will be made of a building at the tentative stage. The uses are controlled by the township zoning ordinance and the developer cannot predict which one of the number of uses permitted will show up as a prospective user, tenant or purchaser. It is only after permits are granted or the buildings are erected that this question can be resolved. Obviously nothing can be done in the commercial area, in terms of use, which does not meet the terms of the zoning ordinance.

Finding of Fact number 22 deals with the sewage question which has been the subject of this Brief, supra. The Finding by the Supervisors as to whether the stream runs dry or not is totally gratuitous and not based upon the evidence.

In Findings of Fact numbers 25 and 26 the Township again stepped outside of the authority vested in it and attempted to invest itself with the authority which has been granted to the Public Utility Commission of the Commonwealth. The Township here raised concerns as to what might happen and how it might apportion the cost in the event the public utility company which operates the plant "becomes defunct or is unable to properly operate the sewage treatment plant and system." The Public Utility Commission of the Commonwealth has sole jurisdiction over the rights and manner in which public utilities operate. Springdale Twp. v. Allegheny County, 76 Pa. Cmwlth. 305, 463 A.2d 1257 (1983); Morrow v. Bell Telephone Co. of Pa., 330 Pa. Super. 276, 479 A.2d 548 (1984), 66 P.S. 501. The Municipality has a right to be repre-

sented at any hearings held by the Public Utility Commission and to make requests of them, but it is in the sole discretion of the Public Utility Commission to grant, deny or condition such request.

The same is true of Finding of Fact number 26 regarding the water system. The water system is solely within the scope of competence of the Department of Environmental Resources, which has indicated its approval of the proposed system at the current stage of the approvals process.

Finally, the Board of Supervisors refused the Tentative Approval on only one ground and that was the feasibility of the proposed sanitary waste disposal system. As hereto indicated, this matter was substantially put to rest by reason of the uncontradicted and unrebutted testimony of Mr. John Burke and

the letter from the Department of Environmental Resources indicating the feasibility of the proposed system. There was no contrary evidence whatsoever. It is also interesting to note in this connection that the Township engineer, who forwarded a number of comments (Township Exhibit "4") (but did not testify), did not question the feasibility of the sanitary sewer system.

III. SUMMARY

For all of the foregoing reasons the Appellant moves the Court to reverse the decision of the Board of Supervisors of Kidder Township and to order the granting of Tentative Approval

for the planned unit development known as Pocono Green.

Respectfully submitted,

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IN THE
COMMONWEALTH COURT OF
PENNSYLVANIA

NO. 1549 C.D. 1987

POCONO GREEN, INC.,

Appellant

v.

BOARD OF SUPERVISORS
OF KIDDER TOWNSHIP
(CARBON COUNTY),

Appellee

BRIEF OF APPELLANT, POCONO GREEN, INC., APPLICANT BELOW

Appeal from the Order
dated June 19, 1987,
of the Court of Common Pleas
of Carbon County
No. 85-0805

Filed:

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I. STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to Section 762 of the Judicial Code, Act of July 9, 1976, P.L. 586, No. 142, as amended, 42 Pa. C.S.A. Section 762.

II. ORDER APPEALED FROM

AND NOW, this 19th day of June 1987, it is hereby ORDERED AND DECREED that the Appeal of Pocono Green, Inc. is DENIED and the Decision of the Board of Supervisors of Kidder Township, denying tentative approval to a Planned Unit Development, is AFFIRMED.

Costs on Appellants.

III. STATEMENT OF QUESTION INVOLVED

In a zoning case where the refusal of an application for tentative approval of a Planned Unit Development turns upon a question of the "feasibility" of a sanitary sewage system which has been professionally designed and has met with preliminary approval of the Department of Environmental Resources and where the ordinance contains no other standard or criteria is it not an abuse of discretion to deny the Tentative Approval when the only evidence to the contrary is that of two protestant, lay witnesses to the effect that the stream into which the system was to discharge periodically runs dry? (Such testimony is irrelevant since stream flow is frequently not required.) Under these circumstances, has the Board of Supervisors not capriciously disregarded the competent

evidence and thus committed an abuse of discretion in disregarding the the [sic] written preliminary approval of the Department empowered to pass upon such matters and the testimony of Applicant's engineer in favor of irrelevant statements by two interested lay witnesses?

Answered in the negative by the Court below.

IV. STATEMENT OF THE CASE

This matter is before the Court on the developer's appeal from the decision of the Court of Common Pleas of Carbon County (per President Judge Lavelle) affirming the action of the Board of Supervisors of Kidder Township in refusing to grant Tentative Approval for a Planned Unit Development known as "Pocono Green." The property in question, a portion of which is in Kidder Township and a portion of which is in the adjoining East Side Borough, is in a district designated "R-2" under the Kidder Township Zoning Ordinance.[14] The part of the tract in East Side Borough has been granted Tentative Approval as a Planned Unit Development which approval is not now subject to appeal. Physically this is one tract and

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[14]See page 1, ¶2 (R 10a.) of the Report of the Supervisors.

one development through which runs the boundary line separating Kidder Township from East Side Borough. The East Side Borough tract is landlocked so that the only means of ingress and egress is through Kidder Township.

On March 13, 1985, Pocono Green, Inc., the developer, made application to the Kidder Township authorities for Tentative approval for a Planned Unit Development on Tannery Road.[15]

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[15]The Report of the Supervisors states that this is a request for a "Preliminary approval of a Planned Unit Development." (R10a.)

This terminology is in error under Article VII of the Pennsylvania Municipalities Planning Code which governs planned unit developments. The proper term is "Tentative Approval". That term is important because it gives rise to very specific and different rights in the planned residential sections of the Pennsylvania Municipalities Planning Code quite different than a conventional "preliminary" subdivision approval under conventional zoning.

Pursuant to the application and notice on the application for a Tentative Approval, the plan was reviewed and recommended for Tentative Approval, with conditions, by the Kidder Township Planning Commission. It was also reviewed by the Carbon County Planning Commission and, with certain comments, recommended for approval.

A public hearing was held before the Board of Supervisors of Kidder Township at the Municipal Building in Lake Harmony on April 29, 1985. At that time the Applicant (Appellant herein) appeared represented by counsel, together with its expert witnesses, and various members of the public also appeared. Applicant's counsel conducted the hearing in its behalf eliciting testimony from the witnesses and various exhibits were introduced into evidence. The testimony

was taken stenographically and transcribed. (R. 31a. - 134a.). On June 17, 1985, the Board of Supervisors issued a written decision entitled "Report of the Supervisors Pursuant to Pennsylvania Municipalities Planning Code in the Township Zoning, Subdivision and Land Use Ordinances and the Township Comprehensive Plan" (R10a. - 23a.) which denied the application for Tentative Approval for only one stated reason which was that the application had failed to prove the "feasibility" of its proposed sewage disposal system. (R22a. - 23a.)

A timely appeal was filed to the Court of Common Pleas. (R135a.) That Court heard the matter on argument without taking additional evidence and affirmed the action of the Board of Supervisors in denying the application for Tentative Approval.

It is the Applicant's position that the decision of the Court below and the Board of Supervisors should be reversed and the Board be ordered to issue the Tentative Approval as requested on the grounds that the Supervisors committed an abuse of discretion or an error of law or both.

V. SUMMARY OF ARGUMENT

This is a zoning case in which the Board of Supervisors of Kidder Township refused an application for Tentative Approval of a Planned Unit Development based on its Finding that the "evidence before the Board is sufficiently deficient in showing the feasibility of the proposed sanitary sewer system."[16] This Finding of Fact which led directly to a conclusion of law that the Applicant had not met its burden of proof, is a classic case of abuse of the Board of Supervisors [sic] discretion in that it was a capricious disregard of the competent evidence which led directly to an error of law.

The uncontradicted evidence of Record adduced by the Applicant's profes-

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[16]The Board of Supervisors apparently abandoned any other makeweight objections before the Court of Common Pleas and only briefed and argued this one.

sional engineer (who did the preliminary design) showed that the Department of Environmental Resources (the agency charged by law with the power to approve or disapprove) had given preliminary written approval of the feasibility of the system. The only contrary evidence was testimony of two lay protestants who asserted that the stream into which the system was to discharge periodically ran dry. This protestant "evidence" is irrelevant because the state of the art now in sewage disposal systems is such that the effluent outfall can be made as clean or cleaner than the incoming water in a potable water system. In any event, it is the Department of Environmental Resources' criteria and judgment which govern here since the ordinance in question has no objective standards of its own.

Hence, the Board of Supervisors committed an abuse of discretion in denying Applicant Tentative Approval and the lower court erred in sustaining the Board's action.

The decision should be reversed and the Board directed to issue the Tentative Approval as requested, at most with a caveat or condition that the Applicant's developer comply with all of the Department of Environmental Resources regulations.

VI. ARGUMENT FOR APPELLANT

A. THE SCOPE OF REVIEW

The scope of review of the Courts, where no additional evidence is taken de novo, is to determine whether the Board of Supervisors abused their discretion or committed an error of law. This was most cogently stated in Doran Investments v. Muhlenberg Township, et al., 10 Pa. Cmwlth. 143, 309 A.2d 450, 453 (1973), where Judge Rogers, writing for this Court en banc, declared:

> "[1] The court below correctly determined that, not having taken additional testimony, its duty was to determine whether the board of commissioners abused their discretion or committed an error of law. Brauns v. Swarthmore Borough, 4 Pa. Cmwlth. 627, 288 A.2d 830 (1972); Defeo v. Brookhaven Borough, 3 Pa. Cmwlth. 377, 283 A.2d 505 (1971). Ours is the same duty.
>
> Doran contends that its plan complies with all of the requirements of Ordinance No. 106 and that it is entitled to

> have its plan tentatively approved."

An abuse of discretion is defined as basing a conclusion upon wholly arbitrary grounds in capricious disregard of competent evidence. It was succinctly put by this Court in Lily Penn Food v. Pennsylvania Milk Marketing Board, 80 Pa. Comwlth. 266, 472 A.2d 715, 718, 719 (1984) where the majority of the court en banc, speaking through Judge Craig, declared:

> "We may only review the discretionary acts of public officials upon a showing of fraud, bad faith, capricious action, or abuse of discretion, Snelling v. Department of Transportation, 27 Pa. Commonwealth Ct. 276, 286, 366 A.2d 1298, 1304 (1976); we have applied that standard to board decisions in the past, Lily Penn II, 68 Pa. Commonwealth Ct. at 605, 437 A.2d at 490; Lily Penn I, 42 Pa. Commonwealth Ct. at 97, 400 A.2d at 663-64. To constitute an abuse of discretion, the board must have based its conclusion upon wholly arbitrary grounds, in capricious dis-

> regard of competent evidence. Lily Penn I, 42 Pa. Commonwealth Ct. at 97, 400 A.2d at 664. Here, the board abused its discretion by a capricious disregard of the only material cost evidence pertinent to the issue of lower minimum prices for lowfat and skim milk.

Appellant submits that in the case at bar the Board of Supervisors committed an abuse of discretion in capriciously disregaring [sic] the only competent evidence and consequently their action in denying the Tentative Approval should be reversed and an Order entered directing them to issue the Tentative Approval for which the application was made.

B. THE RIGHT TO OBTAIN A TENTATIVE APPROVAL FOR A PLANNED UNIT DEVELOPMENT IS DETERMINED BY THE CRITERIA SET FORTH IN THE PARTICULAR ORDINANCE PROVIDED THAT THE ORDINANCE IS CONSISTENT WITH THE ENABLING LEGISLATION.

The law in this Commonwealth is very clear with respect to the standards by which a Planned Unit Development is to be judged. The applicant must show that the plan complies with the specific criteria set forth in the Planned Unit Development Ordinance. The ordinance in turn must comply with the enabling legislation. Once an applicant demonstrates compliance with the applicable criteria (provided they are consistent with the enabling legislation) the applicant is entitled to obtain Tentative Approval. Doran Investments, supra; Abel v. Township of Middletown, 7 Pa. Comwlth. 6, 297 A.2d 525 (1972).

The criteria in the ordinance must be objective and, as will be pointed out infra, if those criteria can be met by the imposition of conditions, then this Court has said it is appropriate to impose conditions and not refuse to grant the Tentative Approval.

In this case the Applicant met or exceeded all of the criteria set forth in Article VII Pennsylvania Municipalities Planning Code (Pa MPC)53 PCA 10701, et seq. and Use Class 14 of the Kidder Township Zoning Ordinance which is the Planned Unit Development Section except, the Township alleges, subparagraph i, which reads as follows:

> i. No residential use of the type herein specified shall be allowed unless said Planned Unit Development is attached to a centralized sewage disposal system before inhabitation of any portion of the development.

There are no definitions in the ordinance of the word "centralized." There are no standards in the ordinance governing "centralized" sewage systems. The word "feasible" is not used in the ordinance. The above quoted section is the ONLY reference to sewage disposal in Planned Unit Developments in the Kidder Township Ordinance.

The ONLY place the term "feasible" is used is in Section 707(4) of the PaMPC (53 PCA 10707(4)), which places limitations upon the contents of an application for Tentative Approval of a Planned Residential Development which can be imposed on an applicant. That section, in pertinent part reads:

> (4) The ordinance shall require only such information in the application as is reasonably necessary to disclose to the governing body or its designated agency: (i) the location, size and topography . . .; (ii) the location and

> size of the common open space . . .; (iv) the use and the approximate height, bulk and location of buildings . . .; (v) the feasibility of proposals for the disposition of sanitary waste and storm water; (vi) the substance of covenants, grants of easements or other restrictions . . .; (vii) the provisions for parking of vehicles proposed streets and public ways; (viii) the required modifications in the municipal land use regulations . . .; (viii.1) the feasibility of proposals for energy conservation . . .; (ix) in the case of development plans which call for development over a period of years, a schedule . . . . (Emphasis supplied).

The Board's abuse of discretion turned precisely on this issue. The lower court said that there were no definitions of the term "feasible" in the Act or in any Pennsylvania case.[17]

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[17]The lower court's opinion reads, in part, "The threshold issue here is the meaning of the term "feasibility" as that term is contemplated in the Act. Our independent research has reveased [sic] that neither the Act nor any Pennsylvania appellate case law provide a definition of that term to guide us. We are, there-

We submit this is incorrect because guidance was supplied by this Court in In Re Appeal of Molnar 64 Pa. Comwlth. 515, 441 A.2d 487, 480 [sic], 491 (1982) which was cited and quoted by the Applicant in its Brief to the lower court. (Applicant's Lower Court Brief pp. 7, 8 and 9). In that case this Court at pp 480[sic]-491 of 441 A.2d said:

> The Borough Council objected finally to the alleged insufficiency of the developer's

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fore, guided by the polestar principle that, where a statutory term is not defined, we must look to the common and approved usage of that term. 1 Pa.C.S.A. Sec. 1903; Commonwealth v. Stanely [sic], 498 Pa. 326, 446 A.2d 583 (1982).

Black's Law Dictionary defines the term feasible, the root of feasibility, as "[c]apable of being done, executed, or affected or accomplished. Reasonable assurance of success." BLACK'S LAW DICTONARY, p. 549 (Fifth Edition, 1979). Feasible is also defined, inter alia, as "[c]apable of being utilized or dealt with successfully; suitable." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, p. 480 (1971). (Opinion of June 19, 1987 at p. 5)

plans for abatement or containment of the presently existing serious storm water drainage problem at the site, arguing that this situation would be severely exacerbated by the proposed development. The developer proposed to deal with the problem by means of a twenty-five year interval storm drainage basin or pond coupled with a rerouting of the stream which runs through the area. The dimension of the basin represented an increase in size from that set forth in the original plan. the [sic] architect, basing his opinion upon the studies and earlier testimony of Dr. John Verna, a hydraulic engineer, testified to the adequacy of the proposal. Several weeks prior to the hearing the proposal and studies done by Dr. Verna had been made available to the Borough's planner and engineer but neither was called to testify or responded at the hearing. There is, therefore, nothing in the record to support the Borough Council's findings of the inadequacy of the storm drainage plan. However, as noted by the Borough Council, the area downstream from the site is subject to flooding and an increase or ill-chosen alteration in flow of the stream would seriously affect downstream properties. Although the Borough cannot burden the devel-

> oper with responsibility, for alleviation of an existing problem, Michaels, it can require the developer to adopt appropriate storm control measures to protect the community against further aggravation of the problem as a result of construction of the PURD. At this stage of the proceedings, however, the developer is required only to disclose the feasibility of proposals for the disposition of storm water, Section 707(4)(v) of the MPC, 53 P.S. Section 10707(4)(v); specifications as to the precise projected relocation of the stream are to be included in his application for final approval. Section 711(a) of the MPC, 53 P.S. Section 10711(a).

Molnar, in many ways is identical to the case sub judice. There the expert testimony of the Applicant's engineer and architect was rejected in favor of unfounded fears of lay witnesses as to storm drainage. (Counsel here was counsel there). This court held such reliance to be an abuse of discretion.

The Board of Supervisor's decision turned upon their rejection of the Applicant's engineer's testimony (Mr. Burke) that the proposed sewage treatment system was feasible and their adoption of the testimony of two lay protestants that the outflow of the sewage plant went into a stream which had little water in it and sometimes went dry. Mr. Burke was apparently unaware of this "fact". Mr. Burke had testified that the proposed sewage plant was feasible, that he had submitted preliminary plans for it to the Department of Environmental Resources and, that they had preliminarily approved those plans. Entered in evidence as Exhibit 6 (R26a. - 30a.) was a letter from the Department of Environmental Resources. The DER letter reads, in pertinent part as follows:

> This Department has reviewed the preliminary plans for

> Pocono Green Development, located in Kidder Township and East Side Borough, Carbon County PA. The proposal submitted utilizing private water supply and distribution and for sewage collection, treatment and disposal is acceptable to the Department of Environmental Resources. (R26a.)

The error is that, even assuming that the Board of Supervisors is correct in believing the two lay witnesses (Messrs. Les Herling and Brady) that the stream runs dry, THIS DOES NOT IMPEACH OR CONTRADICT THE DEPARTMENT OF ENVIRONMENTAL RESOURCES' REVIEW OR THE ENGINEER, MR [sic] BURKE'S TESTIMONY. Today, the technology of these well designed sewage plants is such that the waste water coming out of them is of better quality than ordinary rain water runoff and stream water. The Board's opinion leaves one with the impression (based on the observation of two lay protestants) that the discharge will cause a fetid mess in this

stream. The Board jumps to this conclusion without giving any credence to the fact that it is the DER's standards which govern here. The Township has none except those quoted above. In fact, the DER had reviewed the Applicant's plans and had stated that Applicant's proposed sewage treatment plant is acceptable to them and this preliminary approval has been given no credence by the Board.

The error in the Supervisor's Findings is the implied assumption that, just because there is a low flow (if there is), there is no technology to obviate the problem. That is a totally unwarranted assumption both as a matter of law and fact. As a matter of law, the Board is in error because the jurisdiction to make findings regarding the feasibility of a sewage treatment system absent the enactment of their own stand-

ards, is legally vested in the DER.

As a matter of law, Judge Lavelle of the lower court bottomed his opinion upon Rees v. Board of Supervisors of Indiana Township, ___ Pa. Comwlth. ___, 513 A.2d 584 (1986) which reliance, it is submitted, is in error. The facts in Rees are simply inapposit [sic]. There the Board of Supervisors refused an application for Tentative Approval of a Planned Development for a number of reasons which the Court found to be inadequate reasons for denial. In Rees, there was testimony from residents that the creek into which the sewage system discharged flowed only "intermittently" during the summer months. Between the time of Refusal and the disposition of the case, the developer in Rees entered into an agreement to use the Township's sewage system and a settlement on that

basis was approved by the lower court. The settlement agreement was attacked by the objecting parties, its validity was upheld by the lower court and affirmed by this Court.

The principal differences between Rees and this case are at once obvious. First, all that this Court said there was that evidence of the possible discharge of effluent into a stream which flows only intermittently RAISED A QUESTION of the feasibility of the proposed on-site system. Secondly, there was NO Departmental approval in Rees. This is a very critical difference. The Rees court pointedly said that it was not called upon to decide whether or not this would be sufficient grounds to sustain a denial or would merit remand to consider other

appropriate alternatives.[18]

Secondly, and most important, in Rees there was no showing of preliminary approval of the system by the Department of Environmental Resources as there is here. This is a most important fact because the expertise of the Depart-

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[18]The quote from Rees, supra at p. 102 and 103 of 39 D&C 3rd used by the Court reads more fully as follows:

> "We agree with the board that testimony from residents indicating that the creek into which appellant planned to discharge effluents flows only intermittently during the summer months raised a question as to the feasibility of the proposed private on-site sewage disposal system. However, appellant has agreed to use of the township's public sanitation system rather than the proposed private system. We therefore need not decide whether possible problems with the adequacy of the private system would be grounds to sustain the denial of the application or would instead merit remand to the board to consider other appropriate alternatives." (Emphasis added.)

ment can hardly be denied and, if it should be in error, there is always a right of appeal from its decision. The record of Rees, lodged with this Court, is absolutely silent on the question of DER approval. In the case sub judice, extensive efforts were made to insure that the system would be feasible by seeking the advice of the Department charged with the oversight of such matters and obtaining their opinion in writing that the system would pass muster. That opinion and the DER's preliminary approval are in documentary form, before this Board of Supervisors, as it had been before the Board of Supervisors (Commissioners) of East Side Borough which had approved this system and found it "feasible".

It is also important to note that the technology of these sewage

systems has advanced to the point where it has been demonstrated that the system can be so constructed that effuent [sic] leaving the plant is drinkable (potable).

As against this highly probative evidence the Board in this case decided that, as a matter of law, the statements of two lay persons as to the status of the flow in the stream was sufficient to establish the lack of feasibility of a system which did not necessarily depend upon stream flow. These statements stood in stark contrast against a showing by a registered professional engineer who designed the system and the Department of Environmental Resources that it was feasible. This is in conflict with the directions of this court in Molnar, supra.

It is submitted that such a finding based upon such meager un-

qualified testimony could not sustain a conclusion that the Applicant developer did not sustain its burden of proof with respect to the feasibility of the proposed sewage system.[19]

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[19]The Court's attention is called to the definition of "feasible" which is as follows:

> **fea'si·ble,** a. [Ofr faisable, that may be done, from faire, to make, do.] 1. that may be done, performed, executed, or effected; practicable, possible. 2. likely, reasonable, probably; as a feasible story. 3. that may be used or dealt with successfully; as, land feasible for cultivation.

Webster's Unabridged Second Edition p. 669, Copyright 1983.

> **fea·si·ble** \fe·ze·bel\ adj. [ME faisble, fr., MF, fr. fais - stem of faire to make, do, fr. L. facere -- more at DO] (15(c) 1: capable of being done or carried out <a plan> 2: capable of being used or dealt with successfully: SUITABLE 3: REASONABLE, LIKELY syn see possible.

Webster's Ninth New Collegiate Dictionary p. 453 (1983) copyright 1986.

VII. CONCLUSIONS AND RELIEF SOUGHT

In this case, the record clearly establishes that the only reason for the Board's refusing the Tentative Approval here requested was its conclusion that statements by two uninformed lay witnesses that the stream occasionally ran dry were sufficient to overcome the evidence of preliminary approval of Applicant's proposed sewage treatment system by the Department of Environmental Resources, the agency of the Commonwealth charged with determining these facts, and a qualified professional engineer. Reliance upon such statements, without more, to form the basis for a vital Finding of Fact which leads to a determinative Conclusion of Law was an abuse of discretion on the part of the Board of Supervisors of Kidder Township and is not supportable upon review. This is not

simply a matter of the Board weighing credibility of testimony of equally qualified witnesses, but rather of its relying on witnesses who merely testified to a fact which, in lay terms may raise an inference, but is insufficient to rebut head on the official action of the agency charged with the responsibility of administering such matters.

Accordingly, the Order of the lower court should be reversed, and the Board of Supervisors of Kidder Township should be directed to issue the Tentative Approval requested, perhaps with the caveat that all regulations of the De-

partment of Environmental Resources be complied with.

Respectfully submitted,

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SUPREME COURT OF
PENNSYLVANIA EASTERN
DISTRICT

POCONO GREEN, INC.,	:	No. 3 E.D. Appeal
Appellee,	:	Docket 1989
-against-	:	
BOARD OF SUPERVISORS OF KIDDER TOWNSHIP (CARBON COUNTY),	:	
Appellant.	:	

BRIEF OF APPELLEE
POCONO GREEN, INC.

Appeal from the Order of the
Commonwealth Court, Docket
Number 1549 C.D. 1987

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SUPREME COURT OF
PENNSYLVANIA EASTERN
DISTRICT

POCONO GREEN, INC.,	:	No. 3 E.D. Appeal Docket 1989
Appellee,	:	
-against-	:	
BOARD OF SUPERVISORS OF KIDDER TOWNSHIP (CARBON COUNTY),	:	
Appellant.	:	

BRIEF OF APPELLEE
POCONO GREEN, INC.

SUMMARY OF ARGUMENT

The Commonwealth Court correctly held that the Kidder Township Board of Supervisors "committed an error of law" and "abused its discretion" in denying Pocono Green, Inc.'s application for tentative approval of a planned residential development. Pocono Green, Inc. v. Board of Supervisors of Kidder Township, 117

Pa. Commw. 396, 543 A.2d 1253, 1254 (1988). Pocono Green complied with the only requirements in the Township's ordinances with regard to provisions for sewage treatment in an application for tentative approval of a PRD: (1) Pocono Green's preliminary plan provides for the construction of a sewage treatment plant to serve the entire development (App. 138, 149; see Zoning Ord. § 4.403 (Use Class 14(i)), App. 36); and (2) the Pennsylvania Department of Environmental Resources has determined that Pocono Green's "proposal . . . for sewage collection, treatment and disposal is acceptable to [D.E.R.]." (App. 155; see Subd. Ord. § 3.304(k)(2), App. 99). Despite Pocono Green's compliance with all applicable Township regulations, the Supervisors concluded that Pocono Green's plans for sewage treatment are not fea-

sible,[20] purportedly on the ground that the proposed sewage treatment plant will discharge treated effluent "into a stream which runs dry and leads into a pond that does not discharge . . . except in flooding." (App. 170)

The Commonwealth Court correctly ruled that tentative approval should be granted. First, under settled law, a local governing body cannot deny tentative approval to a PRD plan by relying on standards not contained in its ordinances.

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[20]The Supervisors now state that they "concur[ ] with the Common Pleas and Commonwealth Courts' definition of the term 'feasibility.'" (Brief p. 7) But in their Petition for Allowance of Appeal to this Court, the only general legal question that the Supervisors raised was that "the standard of feasibility under . . . [53 P.S. § 10707] has never been addressed by" this Court. (Petition p. 3) By abandoning without explanation this purported basis for their appeal, the Supervisors raise a serious doubt about their good faith in invoking the Court's discretionary jurisdiction.

Second, D.E.R.'s comprehensive, statewide regulations explicitly provide that a sewage treatment plant can discharge effluent into a stream that runs dry, and D.E.R. imposes no separate standards based on whether the stream flows into a pond or how such a pond drains. Furthermore, the Supervisors did not even explain why it is unsafe to discharge treated effluent into a stream that runs dry or a stream that flows into a pond that discharges by "flooding." Nor did the Supervisors explain why the state-imposed requirement of final D.E.R. approval is inadequate to protect the public interest. The Township has no regulations restricting use of the proposed receiving stream on the grounds advanced by the Supervisors, and any attempt to enact such Township regulations would be preempted by the applicable

D.E.R. regulations.

Finally, the Supervisors' finding of nonfeasibility is incompatible with D.E.R.'s classification of the receiving stream as a "high quality cold water fishery." 25 Pa. Code § 93.9 (List D), p. 93-28. D.E.R. requires that treated effluent discharged into such a stream must meet D.E.R.'s most stringent criteria for effluent quality. See id. § 93.7, pp. 93-13, 14; § 93.7(e). Because D.E.R. has certified, pursuant to those criteria, that Pocono Green's sewage treatment proposal "is acceptable to [D.E.R.]" (App. 155), the Supervisors' finding of nonfeasibility is erroneous as a matter of law.

COUNTER-STATEMENT OF THE CASE

Four years ago, on March 13, 1985, Pocono Green, Inc., a corporation

organized under the laws of Pennsylvania, submitted an application for approval of a preliminary plan for a planned residential development ("PRD") to the Planning Commission of Kidder Township, Carbon County. (App. 137)[21] The proposed development, "Pocono Green," is to be situated on a partially wooded tract of 88.769 acres adjacent to the Pocono Hershey Resort golf course. Approximately 51 acres of the tract are Kidder Township, and the rest of the tract is in East Side Borough.[22] (App. 142-52)

The application to Kidder Township contains various information that an

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[21]An appendix ("App.") submitted with Pocono Green's brief contains materials from the record before the Board of Supervisors.

[22]The portion of the development located in East Side Borough was the subject of a separate application. East Side Borough has granted tentative approval.

applicant for approval of a PRD must submit under Section 707 of the Pennsylvania Municipalities Planning Code ("MPC"), 53 P.S. § 10707, and Kidder Township's Zoning Ordinance ("the Zoning Ordinance") and Subdivision and Land Development Ordinance ("the Subdivision Ordinance") -- including, relevant to this appeal, Pocono Green's "Report on Sewage and Water Facilities." (App. 138) That report explains that because there are no available municipal central sewage treatment facilities, Pocono Green will have its own. The facility will use the "extended air process" method of treatment, and will discharge "final treated effluent . . . to an unnamed tributary of the Lehigh River . . . located at 41°-03'-00" N latitude and 75°-45'-00" W longitude." (App. 139-40) The report also summarizes D.E.R. standards for the

release of effluent into that stream, and further states that those standards "are within the capability" of the proposed sewage treatment system. (App. 140)

On the basis of the application and supporting materials submitted by Pocono Green, the Township Planning Commission issued a report and recommendation to the Board of Supervisors, as required by section 3.202(d) of the Subdivision Ordinance. (App. 92-93) The Planning Commission recommended that the application be "given tentative approval." A condition of the Commission's recommendation was that Pocono Green "provide . . . Pennsylvania D.E.R. approvals for sewage and water systems" to the Board of Supervisors. (App. 160)

Section 3.304(k)(2) of the Subdivision Ordinance provides: "When the subdivision is to be served by a private

central sewage disposal system, the developer shall submit two copies of a letter from [D.E.R.] which states that the system meets the State of Pennsylvania's minimum requirements." (App. 99) Other than this requirement of D.E.R. approval, the Township's ordinances do not list any additional standards that a preliminary subdivision plan must meet with regard to the feasibility of plans for central sewage treatment and disposal.

On April 29, 1985, the Board of Supervisors of Kidder Township held a public hearing on Pocono Green's application. At the hearing, Pocono Green presented its preliminary plan, which included, in accordance with section 3.304(k)(2) of the Subdivision Ordinance, a letter dated April 1, 1985 from the D.E.R. Bureau of Water Quality Management to the Planning Commission. (App.

153-56) In that letter, D.E.R. stated that it had reviewed Pocono Green's preliminary sewage and water plans and found them acceptable:

> This Department has reviewed the preliminary plans for Pocono Green development, located in Kidder Township and East Side Borough, Carbon County, Pa. The proposal submitted utilizing private water supply and distribution and for sewage collection, treatment and disposal is acceptable to the Department of Environmental Resources.

(App. 155) (emphasis added)

Three witnesses for Pocono Green, Inc. appeared at the hearing. James S. Rothstein, a practicing attorney from Berks County and the President of Pocono Green, Inc., gave an overview of the development and discussed the anticipated market for it. (Hearing 8-24, 97-102) James S. Carr, who is a partner in a major national architecture and land planning firm and prepared the prelimi-

nary plan, discussed various design and land use aspects of the plan. (Id. 25-40, 93-96) John A. Burke, a registered professional engineer from Luzerne County, discussed the technical aspects of the preliminary plan: road construction, storm water drainage, soil conditions, water supply, fire protection, and facilities for sewage treatment and disposal. (Id. 41-86)

Concerning sewage treatment, Burke stated that D.E.R. had informed Pocono Green, Inc. of the D.E.R. requirements for discharging treated sewage effluent into the proposed receiving stream at Pocono Green. Burke further explained that, taking the D.E.R. requirements into account, Pocono Green's sewage treatment plans "are feasible from an engineering standpoint." Burke referred the Supervisors to the April 1, 1985 letter from

D.E.R., and he explained that Pocono Green had submitted it to the Supervisors in "response to the requirements of the subdivision and land planning regulations of the Township which require an opinion in writing from [D.E.R.] that the proposed methods of . . . sewage disposal are . . . proper." (Id. 45-47)

Two Township residents raised concerns at the hearing about the ability of the receiving stream to absorb the treated effluent. They stated that the stream sometimes runs dry and that it flows into a pond that drains "only when you have a flood." (Id. 64, 70) Also, a group of residents presented a signed "protest against Pocono Green Developers dumping sewage from their proposed plant into what is called Shantyhouse Creek, or Slaughterhouse Creek." (App. 157; Hearing 68)

In response, Burke acknowledged that "[t]here ha[d] been some discussion at . . . Planning Commission meetings concerning the ability of that stream to absorb the discharge." He noted, however, that D.E.R. had informed Pocono Green that the D.E.R. criteria take "high water flow" and "low water flow" conditions into account, and that Pocono Green will have to meet those criteria in order to obtain a final permit. He also pointed out that the stream runs "almost a mile" from the proposed effluent discharge point to the pond, and that "there is a good deal of renovation that occurs in that distance." Burke explained further that if the stream runs dry, D.E.R. may take that into account in setting standards for the effluent that can be discharged into the stream. Finally, Burke assured those present at the hear-

ing that in order to obtain final approval from D.E.R. for a sewage treatment plant, Pocono Green will need "to demonstrate that the receiving stream will be able to handle the flow . . . in high water and low water times." (Id. 47-49, 59, 70)

Only one other witness testified -- the golf professional from the Hershey Pocono resort, who was called by the Township to testify about the flow of traffic across Pocono Green between two sections of the golf course. (Id. 86-93) The Township did not call any expert witnesses to testify about the preliminary plan's provisions for sewage treatment. Nor did the Township's attorney cross-examine Mr. Burke about the D.E.R. letter submitted by Pocono Green.

On July 17, 1985 the "Report of

the Supervisors pursuant to Pennsylvania Municipalities Planning Code and the Township Zoning, Subdivision and Land Use Ordinances" was issued. (App. 161) The Supervisors' report states that Pocono Green's application for preliminary approval of a planned unit development contains, as required by the MPC, 53 P.S. § 1071 et seq., "[i]nformation on the feasibility of proposals for the disposition of sanitary waste." (App. 163) The report also states that as required by article 4 of the Township Zoning Ordinance, the application includes plans for a centralized sewage disposal system. (App. 169) The Supervisors did not, however, report that the application includes, as required by the Subdivision Ordinance, "a letter from [D.E.R.] which states that the system meets the State of Pennsylvania's minimum requirements."

Subd. Ord. § 3.304(k)(2) (App. 99).

The report states that at the hearing before the Supervisors, "[s]tatements . . . were made by residents in the area" that the stream designated to receive the treated effluent "runs dry and leads into a pond that . . . does not discharge except in flooding." Without citing any evidence other than these statements by two residents at the hearing, the Supervisors concluded "that the feasibility of the proposal for the disposition of sanitary waste has not been shown by the developer." (App. 169-70)

The Supervisors made absolutely no findings as to why, if the proposed receiving stream runs dry and flows into a pond that discharges by flooding, Pocono Green's proposed sewage treatment system will not be able to operate safely and effectively under these conditions.

Moreover, the Supervisors did not even mention the letter submitted to them in which D.E.R. stated that it had determined that Pocono Green's "proposal . . . for sewage collection, treatment and disposal is acceptable to the Department of Environmental Resources." (App. 155) Nor did the Supervisors address the comprehensive D.E.R. regulations that establish specific standards for the quality of treated sewage effluent that may be discharged into each body of water in Pennsylvania. Nevertheless, the Supervisors denied tentative approval on the sole basis of "a lack of showing of feasibility of the proposed sanitary waste system." (App. 174)

On July 16, 1985, Pocono Green filed a notice of appeal in the Court of Common Pleas, Carbon County, seeking to overturn the Supervisors' denial of ten-

tative approval. The Court of Common Pleas did not receive additional evidence, and in an order entered June 19, 1987, affirmed the Supervisors' decision.

The Commonwealth Court reversed. In a decision published at 117 Pa. Commw. 396, 543 A.2d 1253 (1988), the court first noted that D.E.R., "which is charged with the duty to approve or disapprove, gave its preliminary approval for the feasibility" of the Pocono Green sewage treatment plans. 543 A.2d at 1253. Further, the court recognized that by submitting plans for a centralized sewage treatment system, together with the D.E.R. letter of approval of those plans, Pocono Green "conform[ed] with . . . 53 P.S. § 10701 . . . and the local ordinance." 543 A.2d at 1254. The court stated that the approval by D.E.R., and "the testimony of . . . a professional

engineer . . . that the proposed sewage system was 'feasible from an engineering standpoint,'" constitute "substantial evidence" of the "feasibility" of the plans, and that the statements at the public hearing before the Supervisors by the two residents about the receiving stream are insufficient as a matter of law to overcome the "substantial evidence" that Pocono Green adduced. Id.

For these reasons, the Commonwealth Court held that the Board of Supervisors "committed an error of law" and "abused its discretion in concluding that the developer had failed to sustain its burden of proving that the proposed sanitary waste disposal system was feasible." Id. Thus, the decision of the Court of Common Pleas was reversed, and the case was remanded with instructions "to enter an order directing the

Board of Supervisors of Kidder Township to grant preliminary approval of the developer's planned unit development." Id. This appeal by the Board of Supervisors followed.

ARGUMENT

The standard of review to be applied by this Court is well settled. When an appeal is taken from a decision by the Commonwealth Court, the decision should be upheld if the Commonwealth Court properly applied the governing legal principles. Lawner v. Engelbach, 433 Pa. 311, 315, 249 A.2d 295, 297 (1969). The Commonwealth Court, in turn, correctly applied the rule that a board of supervisors' denial of tentative approval for a PRD application must be overturned if the board "abused its discretion or committed an error of law." Pocono Green, 543 A.2d at 1254. See,

e.g., Council of the Borough of Baldwin v. Nernberg, 71 Pa. Commw. 642, 643, 455 A.2d 773 (1983). As shown below, the Commonwealth Court's decision ordering tentative approval must be affirmed for several independent and equally sufficient reasons.

I

BECAUSE KIDDER TOWNSHIP HAS COMPLETELY DEFERRED TO STATE STANDARDS ON SEWAGE TREATMENT, D.E.R. APPROVAL OF POCONO GREEN'S PRELIMINARY PLANS ESTABLISHES COMPLIANCE WITH TOWNSHIP REQUIREMENTS.

As this Court recently observed, the General Assembly has established a "comprehensive . . . statewide regulatory scheme" setting standard for the construction of community sewage treatment facilities and for the control of water pollution from such facilities. Council of Middletown Township v. Benham, 514 Pa. 176, 182, 523 A.2d 311, 314 (1986). That

"comprehensive . . . statewide regulatory scheme" consists of the Sewage Facilities Act, the Clean Streams Law, and the regulations that D.E.R. has promulgated pursuant to those statutes. 514 Pa. at 181-82, 523 A.2d at 313-14.

Under the Clean Streams Law, D.E.R. is the authority responsible for setting standards for the discharge of effluent from sewage treatment facilities into "the waters of this Commonwealth," which are defined to include "all . . . streams . . . [and] ponds." 35 P.S. §§ 691.1, 691.202. The Clean Streams Law assigns to D.E.R. "the power and . . . duty" to

> [e]stablish policies for effective water control . . . and be responsible for the development and implementation of <u>comprehensive</u> public water supply, waste management and other water supply plans.

<u>Id.</u> § 691.5(b)(2) (emphasis added) <u>See</u>

also id. § 691.4(5) (policies of Clean Streams Law require "a comprehensive program of watershed management and control") (emphasis added).

The Clean Streams Law further provides that the discharge of effluent from sewage treatment facilities into the waters of the Commonwealth is permitted only if "authorized by the rules and regulations of [D.E.R.] or . . . permit from [D.E.R.]." Id. § 691.202. Similarly, both the Clean Streams Law and the Sewage Facilities Act require that a person seeking to build a sewage treatment plant that will discharge its effluent into waters of the Commonwealth must first obtain D.E.R. approval of the plans and designs of the proposed treatment system, as well as the proposed location. Id. § 691.207 (Clean Streams Law), § 750.7(a) (Sewage Facilities

Act).[23]

D.E.R. has promulgated extensive regulations pursuant to the Clean Streams Law and the Sewage Facilities Act. For example, D.E.R. has prescribed detailed engineering standards for sewage disposal facilities, see 25 Pa. Code Chapter 73, and of central importance in this case, D.E.R. has issued comprehensive regulations classifying all of the streams in the Commonwealth, including the stream that Pocono Green proposes to use. Those regulations establish, for each class of stream, standards for the quality and volume of effluent that a sewage treatment facility can discharge, according to various criteria, such as the aquatic life that the stream supports and the stream's use for industry, agri-

[23]Local authorities do not have the power to issue such approval. Id.

culture, or recreation. See 25 Pa. Code Chapter 93.

In deference to the "comprehensive . . . statewide regulatory scheme" established by the legislature and D.E.R., Benham, supra, Kidder Township has refrained from enacting any of its own specifications for the design of sewage treatment facilities or the quality or volume of effluent that they can discharge into waters of the Commonwealth that are located in the Township. Rather, Kidder Township has explicitly deferred to D.E.R. in these matters. Thus, in its ordinance prescribing "design standards" for "multi-family dwelling subdivisions and developments." Subd. Ord. § 4.400 (App. 120), Kidder Township simply incorporates D.E.R. sewage treatment standards, without embellishment by the Township. See Subd. Ord.

§ 4.401 ("sewage systems . . . proposed to serve said developments shall comply with requirements of [D.E.R.]") (App. 120); Subd. Ord. § 4.204 ("subdivisions and land developments shall be served with . . . an adequate sewage system . . . acceptable to the appropriate State agency") (App. 109); Subd. Ord. § 4.204(b) ("Every sewage collection and treatment system shall be organized in such a way as to be bought under the jurisdiction of the appropriate State agency") (App. 109-10).

Similarly, the only requirement concerning sewage disposal in the Township Zoning Ordinance's provisions for PRDs is that they must be "attached to . . . a centralized sewage disposal system," Zon. Ord. § 4.403 (Use Class 14(i)), (App. 36), which the Township defines as a "system designed to collect,

centrally treat, and dispose of sewage from customers in compliance with [D.E.R.] regulations." Subd. Ord. § 2.230 (App. 85). See also Zon. Ord. § 2.145 (App. 15).[24] In sum, other than

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[24]The Township's ordinances purport to reserve authority to enact regulations "more stringent" than D.E.R.'s. Id. However, any attempt to do so would be invalid on preemption grounds. First, a local board does "not have jurisdiction as to the type of sewage system to be installed" at a particular site. Stewart v. Zoning Hearing Board of Radnor Township, 110 Pa. Commw. 111, 116-17, 531 A.2d 1180, 1183 (1987). See Benham, 514 Pa. at 181-82, 523 A.2d at 313 (local role limited to enforcement and administration of Sewage Facilities Act); Eckert v. Pierotti, 553 A.2d 114 (Pa. Commw. 1989).

Second, by assigning to D.E.R. "the power and . . . duty" to establish a "comprehensive" water quality program under the Clean Streams Law, 35 P.S. §§ 691.4(5), 691.5(b)(2), without assigning any role to local authorities, the legislature "has retained all regulatory and legislative power for [the state], and no local legislation is permitted," Benham, 514 Pa. at 181, 523 A.2d at 313, concerning standards for effluent discharge. Cf. id. n.6 (distinguishing Clean Streams and Sewage Facilities provisions).

In any event, the Court does not need to reach the preemption issue, be-

the state standards to which its ordinances explicitly defer, Kidder Township has adopted no standards on which the Supervisors could have lawfully relied on considering the feasibility of Pocono Green's plans for sewage treatment and disposal.

The Township's deferral to D.E.R. substantive standards for sewage treatment facilities is reflected in its procedures for obtaining approval of a preliminary subdivision plan. The only information concerning sewage treatment that is required in a preliminary subdivision plan submitted for approval in Kidder Township is "a letter from the Pennsylvania Department of Environmental Resources which states that the [sewage disposal] system meets the State of Penn-

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cause the Township has not even attempted to enact regulations more stringent than D.E.R.'s.

sylvania's minimum requirements." Subd. Ord. § 3.304(k)(2) (emphasis added) (App. 99). Pocono Green has satisfied the Township's requirement by submitting, as part of its preliminary plan, a letter in which D.E.R. certified that Pocono Green's "proposal . . . for sewage collection, treatment and disposal is acceptable to [D.E.R.]." (App. 155) Because Pocono Green has submitted this letter, the Supervisors abused their discretion by denying approval on the ground that Pocono Green's sewage treatment plans are not feasible.[25]

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[25]Because Kidder Township's regulations on PRD applications totally defer to D.E.R. sewage treatment standards, and compliance with those standards therefore establishes the "feasibility" of a preliminary PRD plan in Kidder Township, the Court does not need to determine what "feasibility" means under 53 P.S. § 1707. But even if the Court were to address that question, and even if the Supervisors had not conceded it, see supra note 1, the Commonwealth Court's definition should be adopted: "The term fea-

It is well established that a municipality cannot deny approval of a PRD application on the basis of "a standard not in its regulations." Montgomery Township v. Franchise Realty Interstate Corp., 54 Pa. Commw. 535, 538, 422 A.2d 897, 899 (1980); accord Akin v. South Middleton Township Zoning Hearing Board, 547 A.2d 883, 885 (Pa. Commw. 1988); Michaels Development Co. v. Benzinger Township Board of Supervisors, 50 Pa. Commw. 281, 288, 413 A.2d 743, 747 (1980). Only a few weeks ago, this Court forcefully upheld that rule in a closely related context. In Coretsky v. Board of Supervisors of Butler Township, No. 88

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sibility means that there is substantial evidence to support a finding that the solution of a problem is likely to succeed." 543 A.2d at 1254. See Mitchell Energy Corp. v. Zoning Hearing Board, 108 Pa. Commw. 113, 122, 529 A.2d 585, 588 (1987) (undefined words in land use statutes "must be given their plain, ordinary meaning").

W.D. 1987, ___ Pa. ___, 1989 Westlaw 17244 (March 3, 1989), the Court ruled that if a governing board denies approval for a subdivision, and its decision fails to cite explicitly the provisions in the ordinance on which denial is based, the application is deemed approved, even if all parties understood which provision the board had in mind.

Similarly, because municipalities have been given the power to enact "detailed development standards . . . [in a] planned residential development ordinance," it is "assum[ed] that compliance with those standards . . . lead[s] to approval." Doran Investments v. Muhlenburg Township Board of Commissioners, 10 Pa. Commw. 143, 148 n.1, 309 A.2d 450, 453 n.1 (1973). A governing body must not consider applications of approval of PRD plans on a "case by case"

basis, and cannot deny approval "whenever it concludes for any reason that the plan is not in the public interest." Id. "Having ventured into the area of unit development, the township cannot be permitted to change the rules of the game." Pomona Hill Associates, Ltd. v. East Bradford Township, 24 Chest. 319, 323 (1976). These principles follow from the "longstanding rule," reaffirmed in Benham, that "zoning ordinances should be strictly construed" against the municipality, i.e., in a way that "will least restrict the owner's use of the land," because they "are in derogation of [the] common law" presumption that any use is proper in the absence of a specific prohibition. Benham, 514 Pa. at 185, 523 A.2d at 315-16.

Under these principles, because Kidder Township has explicitly deferred

to Pennsylvania's "comprehensive . . . statewide regulatory scheme" governing sewage treatment and disposal, Benham, by requiring D.E.R. approval of a PRD's sewage treatment plans -- without adding any Township specifications -- and because D.E.R. has certified that Pocono Green's plans for sewage disposal satisfy D.E.R. requirements, Pocono Green's preliminary plan is entitled to tentative approval. By denying tentative approval, even though Pocono Green has complied with all applicable state and Township regulations, the Board of Supervisors "abused its discretion" and "committed an error of law." Council of the Borough of Baldwin v. Nernberg, 71 Pa. Commw. 642, 643, 455 A.2d 773 (1983). Therefore, this Court should affirm the decision of the Commonwealth Court.

II

THE SUPERVISORS' STATED REASONS FOR DENYING TENTATIVE APPROVAL ARE LEGALLY DEFICIENT.

Even assuming, arguendo, that D.E.R. approval of Pocono Green's preliminary plans for sewage treatment is not in and of itself sufficient to require tentative approval because of Kidder Township's deferral to D.E.R. standards, the Commonwealth Court's decision should be affirmed on the additional ground that the Supervisors' stated reasons for denying tentative approval are deficient as a matter of law.

A. The Board's Factual Findings are Legally Insufficient to Support its Decision.

The Supervisors found that Pocono Green's sewage treatment plans are not feasible because, according to the Board's decision, "the proposed sewage treatment plant . . . will discharge into

a stream which runs dry and leads into a pond that does not discharge . . . except in flooding." (App. 170) A conclusion of nonfeasibility based on such a finding has no support in the Township's land use ordinances and flatly contradicts D.E.R. regulations.

As explained above, a municipality cannot deny approval of a PRD application on grounds not contained in its ordinances. Supra pp. 18-19. For example, in Michaels Development Co. v. Benzinger Township Board of Supervisors, 50 Pa. Commw. 281, 413 A.2d 743 (1980), the developer's plan complied with the township's PRD ordinance, but the board of supervisors nevertheless denied approval because it found that the location of the common open space envisioned in the plan was not in the public interest. The court emphatically rejected the

board's position: "The Board's objection cannot be upheld; the Ordinance contains no standards regarding location [of common open space]." 50 Pa. Commw. at 288, 413 A.2d at 747. Therefore, the court ordered tentative approval granted. 50 Pa. Commw. at 290, 413 A.2d at 748.

Kidder Township's land ordinances use do not contain any restrictions regarding discharge of effluent into the stream indicated in Pocono Green's plan. Nor do the Township's ordinances contain any general restriction on discharging effluent into streams that run dry or flow into ponds, regardless of how such ponds drain. In the absence of such restrictions in the Township's ordinances, "[t]he Board's objection cannot be upheld." Michaels,

supra.[26]

Furthermore, the Board's speculation that it is unfeasible to discharge treated effluent into a stream that runs dry, or a stream that flows into a pond that drains by flooding, flatly contradicts D.E.R. regulations. As noted above (supra pp. 14-15), D.E.R. has classified all the waters of the Commonwealth and has established, for each class of stream, standards for discharging treated effluent. See 25 Pa. Code Chapter 93. Under D.E.R. regulations, those standards are based on what D.E.R. calls "design flow" -- a long-range, highly stream-protective view of data that D.E.R. has assembled on the flow of water in each stream -- the "lowest 7-consecutive-day

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[26]Even if Kidder Township were to attempt to enact an ordinance imposing such restrictions, such an ordinance would be invalid on preemption grounds. See supra note 5.

average flow that occurs once in 10 years." 25 Pa. Code § 93.5(b). D.E.R.'s explanation of its use of design flow data explicitly takes into account that some streams occasionally run dry:

> Where the lowest 7-consecutive-day average flow that occurs once in 10 years is zero, the Department shall specify the design flow based on the identified or estimated flow at that point where a use identified in § 93.4 (relating to statewide water uses) becomes possible.

Id. (emphasis added). Section 93.4, in turn, lists various uses of streams, such as support of warm-water aquatic life, removal of water for irrigation or industry, and assorted recreational uses. Id. § 93.4(a). D.E.R. allows discharge of effluent into streams having all of those uses, whether or not such streams run dry. See § 93.7 (Table 5) Furthermore, D.E.R. makes no distinction -- insofar as the ability to accommodate ef-

fluent is concerned -- between streams that flow into ponds, regardless of how such ponds drain, and streams that flow elsewhere. See 25 Pa. Code Chapter 93.

In sum, D.E.R. regulations specifically allow sewage treatment plants to discharge effluent into streams that run dry, and D.E.R. does not restrict such discharge if a stream flows into a pond, regardless of how the pond drains. Because the Supervisors' decision is based on pure speculation that such conditions would create a hazard, and because such speculation is contrary to the "comprehensive . . . statewide regulatory scheme" established by D.E.R., Benham, the Commonwealth Court correctly held that the Supervisors' decision was an error of law.

B. The Board of Supervisors Failed to Provide Specific Objections to Pocono Green's Plan.

An independent ground for affirming the Commonwealth Court's decision is that the Board of Supervisors' conclusion -- that Pocono Green's proposed sewage treatment system is unfeasible -- is based on several unarticulated assumptions, leaving many essential questions unanswered as to how the Supervisors reached their conclusion. Under settled case law that has developed specifically in the area of land use, such a failure by a municipality to substantiate its decision is itself grounds for reversal.

The Supervisors did not make any specific findings concerning the characteristics of the stream and pond in question, or the effects of the proposed sewage treatment plant on them. How often does the stream run dry? What uses

of the receiving stream should be protected? What, if any, damage might the effluent cause to such uses? What quality or volume of effluent would be acceptable? What is the pond's normal level? At what level does it "flood," and how often does it thereby drain? Where does the outflow from the pond go? Is the outflow a hazard now? How would the sewage treatment system create a hazard or exacerbate an existing hazard? Why is the "renovative" effect of the stream between the discharge point and the pond (testimony of J. Burke, Hearing 70) insufficient?

These questions go to the heart of the Supervisors' conclusion on feasibility. By leaving them unanswered, the Supervisors failed to show whether their conclusion has any rational basis.

The MPC requires that when a municipality denies tentative approval for a PRD plan, the municipality must "set forth with particularity in what respects the development . . . would not be in the public interest." 53 P.S. § 10709(b). The courts have rigorously applied this provision, and have required governing boards "to advance public interest objections . . . of an exceptional and specific nature." Council of the Borough of Baldwin v. Nernberg, 71 Pa. Commw. 642, 644, 455 A.2d 773, 774 (1983) (affirming decision to Judge (now Justice) Papadakos). The board must "tell why a hazard would result [and] exactly why [the plan's] provisions for [the potential hazard] are not adequate," rather than "indulg[ing] . . . in vague generalities." Doran Investments v. Muhlenberg Township Board of Commissioners,

10 Pa. Commw. 143, 159-160, 309 A.2d 450, 458-59 (1973).

Here, by leaving the questions noted above unanswered, the Supervisors failed to comply with the dictates of the MPC. The Commonwealth Court's decision ordering tentative approval should therefore be affirmed.

C. The State's Requirement of Obtaining Final D.E.R. Approval Fully Protects The Public Interest.

It is well settled that even when a governing board adequately substantiates potential problems in a PRD preliminary plan -- which in this case the Supervisors utterly failed to do -- the proper action for the board to take is not to deny tentative approval, but to grant approval subject to the condition that the final plan must address the potential problems that the board has raised. See, e.g., Hakim v. Board of

Commissioners of O'Hara Township, 19 Pa. Commw. 661, 667-68, 339 A.2d 905, 909 (1975); Doran, 10 Pa. Commw. at 148 n.1, 160, 309 A.2d at 453 n.1, 458.

In Pomona Hill, 24 Chest. 319 (1976), for example, tentative approval was ordered for a PRD plan whose provisions for sewage treatment were much less complete than the Pocono Green plan:

> The Board . . . found that a Sewer Authority was considering providing sewage treatment service and that the developer, in the alternative, would apply for permission to build a treatment plant. The Board concluded that since neither alternative had in fact been approved, the provision was inadequate. Again the Board ignores . . . the fact that only tentative approval is sought . . . [S]uch approvals should properly be the subject of a condition to tentative approval, and not the basis for denial.

Id. at 324 (emphasis added). See Stein v. Easttown Township Board of Supervisors, 110 Pa. Commw. 293, 306, 532 A.2d

906, 912-13 (1987) (where D.E.R. approval is applied for but not yet obtained, it is "more reasonable to condition final subdivision approval upon the issuance of this . . . permit than to abort the plan at conception").[27]

The grounds for ordering tentative approval are even more compelling in this case than in Pomona Hill and Stein. Here D.E.R. has already certified that Pocono Green's "proposal . . . for sewage

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[27]Similarly, in Rees v. Board of Supervisors of Indiana Township, 99 Pa. Commw. 452, 513 A.2d 584 (1986), the court held that tentative approval was properly granted on the basis of the applicant's undertaking to "adequately provide for the public health, safety and welfare, and remedy" objections concerning sewage disposal. 99 Pa. Commw. at 456, 513 A.2d at 586. The Supervisors' reliance (Brief p. 8) on a passing remark in Rees concerning the validity of the objection is unavailing. That remark was dictum (the court affirmed the grant of tentative approval); there is no indication that the applicant had obtained D.E.R. approval; and the court was not called upon to address the applicable D.E.R. regulations.

collection, treatment and disposal is acceptable to [D.E.R.]." (App. 155) An explicit condition of final D.E.R. approval is unnecessary, because, as explained above, the Clean Streams Law and the Sewage Facilities Act require that any central sewage treatment facility must be built pursuant to a D.E.R. permit and must comply with those statutes and the regulations promulgated pursuant to them. Supra pp. 14-15. These state-imposed conditions ensure that Pocono Green's sewage treatment facility will operate in a manner consistent with the public interest. Because the Supervisors failed to address the protections provided by state law, the Commonwealth Court correctly held that the Supervisors' denial of tentative approval was an abuse of discretion.

These considerations are especially critical because of the time that has passed since Pocono Green submitted its application. The remarks of the Commonwealth Court, in a case that consumed approximately three years from the time of application until that court's decision, are pertinent here:

> The time has come . . . for the Township to cease its foot-dragging, nit-picking, and logic-chopping. If the [developer] is not granted prompt and comprehensive relief, its . . . legal victories in this prolonged litigation will be indistinguishable from defeat.

Township of Plymouth v. County of Montgomery, 550 A.2d 1033, 1040 (Pa. Commw. 1988). Thus, because of the protections provided by state law, and in light of the time that has passed since Pocono Green submitted its application, it would be especially improper to permit the Supervisors to impose any explicit condi-

tions concerning sewage treatment. The Commonwealth Court's order should be affirmed in its entirety.

III

THE SUPERVISORS' FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Commonwealth Court's decision should be affirmed for the additional reason that the Supervisors did not provide legally sufficient evidentiary support for their factual findings. It is well within this Court's scope of review to reverse the Supervisors' findings if they "are not supported by substantial evidence." Valley View Civic Association v. Zoning Board of Adjustment, 501 Pa. 550, 555, 462 A.2d 637, 640 (1983). This Court has defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. See also Michaels, 50 Pa. Commw. at 286, 413 A.2d

at 747 (public interest objections to PRD plan must have "legitimate basis in law and fact"). As shown below, the Supervisors' findings contradict D.E.R.'s findings and in any event are not supported on the record.

The Report on Sewage and Water Facilities submitted to Kidder Township by Pocono Green as part of the application for approval of its preliminary plan describes the receiving stream as follows: "Final treated effluent will be discharged to an unnamed tributary of the Lehigh River," and the "point of effluent discharge is located at 41°-03'-00" N latitude and 75°-45'-00" W longitude." (App. 139-40)[28] That stream and other

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[28]The Supervisors assert that the Sewage and Water Report was not "introduced at the hearing." (Brief p. 8) In fact, Pocono Green's engineer stated at the hearing that D.E.R.'s letter was a response to plans submitted to D.E.R. (Hearing 46) Moreover, it is indis-

Lehigh tributaries in the same area have been classified in D.E.R. regulations as "high quality cold water fisheries." 25 Pa. Code § 93.9 (List D), p. 93-28; id. § 93.3.[29] D.E.R. requires that treated effluent discharged into such a stream must meet D.E.R.'s most stringent criteria for effluent quality. See id. § 93.7, pp. 93-13, 14; § 93.7(e). Because D.E.R. has certified, pursuant to those criteria, that Pocono Green's sewage treatment proposal "is acceptable to [D.E.R.]" (App.

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putable that the Report was part of the application submitted to the Supervisors. (See Pocono Green Appendix 137; Board of Supervisors R. 5a (truncated page of Report)).

[29]D.E.R. regulations list the stream as an "unnamed tributary to the Lehigh River." Id. While participants at the hearing before the Supervisors referred to the stream as "Slaughterhouse Creek" and "Shantyhouse Creek" (App. 157), no stream by either name appears in the map contained in the Kidder Township Zoning Ordinance (App. 75), or in the D.E.R. lists for Carbon County. See 25 Pa. Code § 93.9.

155), the Supervisors' finding of non-feasibility is erroneous as a matter of law.

Furthermore, as noted in Section II.B above, the Supervisors failed to make any findings whatsoever about the capabilities of Pocono Green's proposed method of sewage treatment, the engineering characteristics of the treatment plant, or the specific effect of the treatment plant on the stream or its uses. In the absence of such evidence in the record, and in light of the D.E.R. regulations addressing the quality of effluent that may be discharged into the stream, consistent with its protected uses, the Supervisors' bare conclusion of nonfeasibility is devoid of "a legitimate basis in . . . fact." Michaels, 50 Pa. Commw. at 286, 413 A.2d at 747. For that additional reason, the Commonwealth Court

correctly determined that the Board of Supervisors "abused its discretion." Pocono Green, 543 A.2d at 1254.

CONCLUSION

For the reasons stated above, the order of the Commonwealth Court should be affirmed, and the Board of Supervisors should be ordered to grant the application of Pocono Green, Inc. for tentative approval.

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March 27, 1989

Respectfully submitted,

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